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Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

ROBERT M. DAVIDSON and
VANESSA E. KOMAR,

Petitioners,

v.

JAY GROSSMAN; EUDICE GROSSMAN; GAYLE F. PETRILLO; CHARLES OTT; JOANNE C. WRAY; KENT J. THIRY; JOSEPH C. MELLO; MICHAEL J. MEEHAN; BRUCE R. HEURLIN; ANTHONY P. TARTAGLIA; DVA RENAL HEALTHCARE INC; ALBANY MEDICAL COLLEGE; VIVRA HOLDINGS INC; GAMBRO HEALTHCARE INC; DAVITA INC; SEPRACOR INC,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT M. DAVIDSON
VANESSA E. KOMAR
Petitioners Pro Se
P.O. Box 1785
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QUESTIONS PRESENTED

1. Whether the Fifth Circuit Judgment affirming the dismissal of Petitioners' lawsuit for improper venue denied Petitioners' right to Due Process and Equal Protection.

2. Whether the District Court abused its discretion when it denied Petitioners' Motion to Vacate Judgment Under Rule 60(b) and denied Petitioners' Motion to Alter or Amend Judgment Under Rule 59(e).

3. Whether the Court's decision dismissing this case for improper venue, a decision that has been affirmed by the United States Court of Appeals for the Fifth Circuit, was based on fraud or is void.

4. Whether the Final Order of District Court dismissing Petitioners' lawsuit for improper venue was an abuse of discretion.

PARTIES BELOW

Petitioners are Robert M. Davidson and Vanessa E. Komar.

Respondents are Jay Grossman, Eudice Grossman, Gayle F. Petrillo, Charles W. Ott, Joanne C. Wray, Kent J. Thiry, Joseph C. Mello, Michael J. Meehan, Bruce R. Heurlin, Anthony P. Tartaglia, DVA Renal Healthcare Inc., Albany Medical College, Vivra Holdings Inc., Gambro Healthcare Inc., Davita Inc., and Sepracor Inc.

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3. Judgment of November 26, 2004, Pima County Superior Court Case C333954, *Grossman v. Davidson*

4. Final Order of July 5, 2007 in United States District Court Southern District of Texas

5. Memorandum and Order of July 5, 2007, in United States District Court Southern District of Texas

6. Judgment of March 6, 2008, in United States Court of Appeals Fifth Circuit

7. Memorandum and Order of August 14, 2007, in United States District Court Southern District of Texas

8. Order of September 19, 2008, in United States District Court Southern District of Texas

9. Order of February 28, 2008 in United States Court of Appeals Fifth Circuit

10. Order of April 9, 2008, in United States District Court Southern District of Texas

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17. Order of February 2, 2004, in United States District Court Arizona District (CV-03-580 TUC FRZ)

18. Order of Dismissal of January 5, 2007, in United States District Court Northern District of Texas

JURISDICTION

The United States District Court for the Southern District of Texas had subject matter jurisdiction under the Racketeer Influenced and Corrupt Organization Act of 1970 (18 U.S.C. § 1961, *et seq.*) ("RICO"), 28 U.S.C. § 1331, 28 U.S.C. § 1332, 28 U.S.C. § 1367. The opinion and judgment of the Fifth Circuit was rendered on March 6, 2008. Pursuant to Supreme Court Rule 13.1, this petition has been filed within

ninety days of the rendering. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Notifications required by Rule 29.4(b) and (c) have been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portion of the due process clause, United States Constitution, Amendment V, is set out below: No person shall . . . be deprived of life, liberty, or property, without due process of law. United States Constitution, Amendment IX provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." United States Constitution, Amendment XIV provides: "No state shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Arizona Rules of Civil Procedure

Rule 5.1 Duties of Counsel

(A) Attorney of Record: Withdrawal and Substitution of Counsel.

(2) Withdrawal and Substitution. Except where provided otherwise in any local rules pertaining to domestic relations cases, no attorney shall be permitted to withdraw, or be substituted, as attorney of record in any pending action except by formal written order of the court, supported by written application

setting forth the reasons therefore together with the name, residence and telephone number of the client, as follows:

(B) Where such application does not bear the written approval of the client, it shall be made by motion and shall be served upon the client and all other parties or their attorneys. The motion shall be accompanied by a certificate of the attorney making the motion that (i) the client has been notified in writing of the status of the case including the dates and times of any court hearings or trial settings, pending compliance with any existing court orders, and the possibility of sanctions, or (ii) the client cannot be located or for whatever other reason cannot be notified of the pendency of the motion and the status of the case.

(C) No attorney shall be permitted to withdraw as attorney of record after an action has been set for trial, (i) unless there shall be endorsed upon the application therefore either the signature of a substituting attorney stating that such attorney is advised of the trial date and will be prepared for trial, or the signature of the client stating that the client is advised of the trial date and has made suitable arrangements to be prepared for trial, or (ii) unless the court is satisfied for good cause shown that the attorney should be permitted to withdraw.

Prescription Drug User Fee Act

21 U.S.C. § 379g

Title 21 – Food and Drugs

Chapter 9 – Federal Food, Drug, and Cosmetic Act

Subchapter VII – General Authority

Part C – Fees

Subpart 2 – fees relating to drugs

Sec. 379g. Definitions

-STATUTE-

For the purposes of this part:

(1) The term "human drug application" means an application for –

(A) approval of a new drug submitted under section 355(b)(1) of this title,

(B) approval of a new drug submitted under section 355(b)(2) of this title after September 30, 1992, which requests approval of –

(i) a molecular entity which is an active ingredient (including any salt or ester of an active ingredient), or

(ii) an indication for a use, that had not been approved under an application submitted under section 355(b) of this title, or

(C) licensure of a biological product under section 262 of title 42.

Such term does not include a supplement to such application,

[*Et seq.*]

21 U.S.C. § 379h

Title 21 – Food and Drugs

Chapter 9 – Federal Food, Drug, and Cosmetic Act

Subchapter VII – General Authority

Part C – Fees

subpart 2 – fees relating to drugs

Sec. 379h. Authority to assess and use drug fees

-STATUTE-

(a) Types of fees

Beginning in fiscal year 2003, the Secretary shall assess and collect fees in accordance with this section as follows:

(1) Human drug application and supplement fee

(A) In general

Each person that submits, on or after September 1, 1992, a human drug application or a supplement shall be subject to a fee as follows:

(i) A fee established under subsection (c)(4) of this section for a human drug application for which clinical data (other than bioavailability or bioequivalence studies) with respect to safety or effectiveness are required for approval.

(ii) A fee established under subsection (c)(4) of this section for a human drug application for which clinical data with respect to safety and efficacy are not required or a

[*Et seq.*]

STATEMENT OF THE CASE

I. Factual summary

Davidsons have stated a non-frivolous claim for relief under the RICO Act, Civil Rights Act of 1871, and Declaratory Judgment Act. The dismissal of this case should be reversed on the merits by this Court. This a case in which questions of subject matter jurisdiction were raised for the first time *after* trial. Davidson did not realize that Meehan's Declaration of Michael J. Meehan (Document 41) was perjured until on or about January 2, 2008. Meehan's perjured affidavit in support of his Motion to Dismiss (Document 41), substantially interfered with Davidsons' ability to fully and fairly try the case. It is clear and well-established law that whenever an officer of the court makes any misrepresentation, whether of commission, or omission, of silence, or of concealment,

that attorney (officer of the court) commits "*fraud upon the court*," and deprives the judge of jurisdiction over the subject matter.

Davidsons have suffered a continuing series of separate injuries. *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (1988). Davidsons' RICO counts demonstrate a pattern of racketeering activity which caused a continuing series of separate injuries. Each turnover order and garnishment proceeding against Davidsons in favor of Jay Grossman and Eudice Grossman in Gregg County, Texas under the Uniform Enforcement of Foreign Judgments Act, represents a separate new injury to Davidsons' business and property. The nexus between the Section 1983 injury, the RICO injury, and the pendant state law injury is found in the Minute Entry Order of November 24, 2004, in the Arizona state action. This Order of the Arizona trial court provides a very direct link[1] between Grossmans' violations of the substantive RICO statute [18 U.S.C. § 1962(b)] alleged in Count One of the Amended Complaint (Document 19), and injury to Davidsons' business and property.

After the U.S. Court of Appeals Judgment of March 6, 2008, Davidsons moved the District Court (Houston) to vacate and set aside the Judgment

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[1] *See also* the Amended Judgment (Nunc Pro Tunc), file-stamped on January 4, 2005, in the Arizona State Action found at pages 34-36 of Document 98. *See* the Judgment of November 26, 2004, in the Arizona State Action.

Under Rule 60(b) (Document 95) and reinstate the lawsuit for jury trial on the merits, as to all parties and all counts. Davidsons also raised the issue of the District Court's subject matter jurisdiction on appeal. The District Court's decision dismissing this case for improper venue, a decision that has been affirmed by the United States Court of Appeals for the Fifth Circuit, was based on fraud or is void.

See Document 95 at page 9, ¶ 14, which states,

> "Any fraud connected with the presentation of a case to a court is a fraud upon the court, in a broad sense. Moore & Rogers, Federal Relief from Civil Judgments, 1946, 55 YALE L. J. 692 n. 266. There is a powerful distinction between perjury to which an attorney is a party and that with which no attorney is involved. Murray Fogler's knowing, willful participation in Michael J. Meehan's perjured affidavit and Motion to Dismiss (Document 41) is the relevant consideration in Davidsons' seeking relief from judgment or order based upon Fraud on the Court."

Davidsons are not pro se litigants by choice. *See* Count Seven of the Amended Complaint (Document 19). Davidsons are pro se litigants by fiat of the trial court under color of Arizona Rule of Civil Procedure 5.1 ("ARCP 5.1") in the Arizona State Action. ARCP 5.1 is unconstitutional, both on its face, and as applied to the Davidsons. *To date, no federal or state court has ever reached the Constitutionality of ARCP 5.1.*

Davidsons, appearing *of necessity* without the benefit of retained legal counsel, should not be held to an impossible standard. Davidsons should not be expected to know the basis upon which the Fifth Circuit based its judgment, when the judgment was indisputably an *affirmation without opinion* ("AWO"), when even the Honorable District Judge is *admittedly* uncertain as to whether the Fifth Circuit rejected Davidsons' arguments on appeal. The Order (Appendix B) of April 22, 2008, and the Order (Appendix C) of April 9, 2008, are quite remarkable in that even after jurisdiction re-vested (Appendix A) on March 6, 2008, in the District Court, the Court *apparently* persists in the view that this lawsuit was properly dismissed for improper venue on July 5, 2007.

II. Basis for federal jurisdiction

Davidsons' basis for federal jurisdiction and venue is found at ¶s 1 and 2, of pages 1 and 2 of the Amended Complaint (Document 19). Davidsons never *knowingly* waived this statement. The District Court (Houston) had jurisdiction under 18 U.S.C. § 1964(c), 28 U.S.C. § 1331, 28 U.S.C. § 1367, and 28 U.S.C. § 1332. This civil action arises under the laws of the United States.

REASONS FOR GRANTING THE WRIT

Review by this Court is sought pursuant to Supreme Court Rules 10(a) and 10(c). As set out below, the decision of the Fifth Circuit is in conflict with decisions of other circuit courts. As set out below, the decision of the Fifth Circuit *has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the district court, as to call for an exercise of the Court's supervisory power.* As set out below, the decision of the Fifth Circuit *decided an important question of federal law that has not been, but should be, settled by this Court.*

I. A factual amplification

This is an action alleging violations of the Due Process or Equal Protection Clauses of the Fifth and Fourteenth Amendments. Actions of this type cannot be decided on a Rule 56 motion. *Homar v. Gilbert*, 89 F.3d 1009 (3rd Cir. 1996), *reversed on the merits*, 117 S.Ct. 1807. The constitutionality of the Prescription Drug User Fee Act, Arizona Rule of Civil Procedure Rule 5.1, and the declaratory relief sought in Counts Five and Six are material to Davidsons' Article III standing and to Davidsons' assertion of equitable estoppel. This Court is referred to ¶s 89, 90, and 8.78-8.85 of the Amended Complaint (Document 19) under the heading Tolling the Statute of Limitations. *¶89 incorporated by reference ¶s 8.78-8.85. See especially ¶ 90 which states, "Defendants are estopped from*

asserting the statute of limitations as a defense to this Complaint. . . ."

This lawsuit was improperly dismissed on the basis of statute of limitations and res judicata ***without a hearing, without ten-day notice of a hearing, and without an adequately developed record***. The issue of *res judicata* does not appear on the face of the Amended Complaint. The District Judge admitted that she considered evidence extrinsic to the complaint. The merits of Davidsons' Amended Complaint are closely enmeshed with federal and state tolling doctrines (federal equitable estoppel and Texas tolling rules). The Constitutionality of the Prescription Drug User Fee Act is material to Davidsons' Article III standing and to whether Davidsons' have stated a claim for relief under the RICO Act. The Constitutionality of Arizona Rules of Civil Procedure Rule 5.1 is material to Davidsons' Article III standing and to whether Davidsons' have stated a claim for relief under the Civil Rights Act of 1871.

Nowhere in the Final Order of July 5, 2007, did the District Court (Houston) reach the merits of Davidsons' claims. Regardless of how the District Court (Houston) chose to label the dismissal of this lawsuit, the dismissal falls squarely under the heading of an improper jurisdictional dismissal which rested solely upon allegations of *res judicata* and statute of limitations. The dismissal of this lawsuit cannot stand without the allegations of *res judicata* and statute of limitations.

This is a case in which the parties were litigating *numerous* 12(b) motions to dismiss (including 12(b)(6) motions) from *multiple* parties. The District Judge admitted to having considered evidence extrinsic to the complaint. *See* App. 31 where it states, *inter alia*, *"The Court has carefully reviewed the full record in this case. Based on this review and the application of governing legal authorities, the Court grants the Motions to dismiss and* ***dismisses*** *this case for improper venue as to all defendants."*

Davidsons properly raised the issue of procedural impropriety on appeal. By denying Davidsons the greater procedural protections afforded by Rule 56, the District Court (Houston) denied Davidsons their right to Due Process under the Fifth Amendment. Because the Fifth Circuit Judgment was an unpublished nonopinion, ***Davidsons have no way of knowing the basis upon which the Circuit Court affirmed dismissal.*** The District Judge failed to convert the motion to dismiss to a motion for summary judgment. The appellate court should have recharacterized the district court's ruling and reviewed it, as appropriate, pursuant to Rule 56. *Fraternal Order of Police Dept. Of Corrections Labor Committee v. Williams*, 375 F.3d 1141 (2004); *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996). *"[V]igorous enforcement of the conversion requirement helps ensure that courts will refrain from engaging in fact-finding when considering a motion to dismiss, and also that plaintiffs are given a fair chance to contest defendants' evidentiary assertions*

where a court nonetheless does consider evidence extrinsic to the complaint. . . ." *Courtenay Communications Corp. v. Hall*, 334 F.3d 210 (2d Cir. 2003).

Davidsons did not have a fair chance to adequately contest all of defendants' numerous "evidentiary" assertions (much less the perjured assertions) as to venue, *res judicata*, limitations, standing, subject matter jurisdiction, personal jurisdiction, and failure to state a claim, where the District Court considered evidence extrinsic to the Complaint. There was no hearing, no ten-day notice of a hearing, and no opportunity for jurisdictional discovery. *See Justin Love et al v. National Medical Enterprises et al*, 230 F.3d 765 (5th Cir. 2000).

The affidavit and exhibits (circled #1 thru #55) found attached to Document 98 *thoroughly* ***impeach*** the Declaration of Michael J. Meehan (Document 41) and *thoroughly* ***impeach*** certain material jurisdictional assertions found in Grossmans' and Heurlins' motion to dismiss the Amended Complaint (Document 39).

Meehan's Rule 12(b)(2) motion (Document 41) to dismiss the *Complaint* and Grossmans' and Heurlins' motion (Document 39) to dismiss the *Amended Complaint* are also ***impeached*** by the affidavits and exhibits (circled #1 thru #89) submitted to the Fifth Circuit in support of Appellants' Objection to Motion of Grossmans and Heurlin under FRAP 38 ("Appellants' Objection to FRAP 38 Motion") *on or about January 24, 2008.* These exhibits (circled #1 thru

#89) are identical to those which were attached to Document 95 in the District Court (Houston).

Both Meehan's Answer Brief and Grossmans and Heurlin's Answer Brief are ***impeached*** by the affidavits and exhibits (found at circled page #1 thru #89) submitted (as attachments to) in support of Appellants' Objection to FRAP 38 Motion on or about January 24, 2008.

Davidsons did not have access to the disputed information or knowledge of inaccuracies in Meehan's representations, Murray J. Fogler's representations, or Daniel J. Artz's representations, *at the time of the alleged misconduct*. The computer hard drive that Davidson was using in Corpus Christi, Texas from 1999-2000 "*crashed*" several years ago (it may still be recoverable). On or about January 2, 2008, Davidson located scanned documents relating to the Arizona state action in Pima County Superior Court (*Grossman v. Davidson*, Case No. C333954) on a CD that Davidson had "*burned*" to backup the data. On or about January 2, 2008, Davidson also located a box of documents (original legal filings from Pima County Superior Court Case No. C333954) which were obtained from Michael J. Meehan *after multiple requests* on or about January or February of 2002. This box of documents was subsequently moved by Davidson from Tucson, Arizona to Kilgore, Texas, where it remained *in storage* until recently.

Davidsons have made a showing of actual injury and the presence of circumstances beyond the movant's

control that prevented timely action to protect their interests. See Ojeda-Toro v. Rivera-Mendez, 853 F.2d 25 (1st Cir. 1988). *See* the Order (Document 80) filed on September 19, 2007. *See* the affidavit and exhibits submitted in support of Document 83. *See* also the affidavits and exhibits submitted in support of Documents 95 and 98.

The Court is referred to pages 1 and 2 of Davidsons' Reply Brief, which states, *inter alia*,

> Davidsons have *recently* discovered, and *will* provide at trial, a series of fax and mail communications *related to this lawsuit* between Meehan (in Tucson, AZ) and the Davidsons (*in Corpus Christi, TX*) *between October 1999 and May 2000.* These communications include letters on Meehan & Associates letterhead sent by Meehan to the Davidsons in Corpus Christi, Texas dated October 14, 1999, November 30, 1999, December 9, 1999, December 31, 1999, January 4, 2000, January 31, 2000, February 8, 2000, February 29, 2000, March 2, 2000, April 5, 2000, April 7, 2000, and May 3, 2000. ***Meehan perjured himself to the District Court (Houston) to conceal these material jurisdictional facts.*** *See* Meehan's affidavit (filed on May 7, 2007) at CA5 920-923, especially ¶ 6 found at CA5 922, where it states,
>
> ***None of the events related to this matter took place in Texas. I represented Dr. Davidson in Arizona State Court in***

2001-2002. I was permitted to withdraw as Dr. Davidson's counsel by order of an Arizona state court on January 22, 2002. I have had no communications with Dr. Davidson since that time.

FRCP Rule 11(b) provides that persons who sign, file, submit or later advocate documents are certifying to the court that the document or advocacy is based upon the person's best knowledge, information or belief, which is in turn based upon an inquiry that was reasonable in the circumstances of the particular case. An attorney operates under a *"continuous obligation to make inquiries." See Antonious v. Spalding & Evenflo Companies,* 275 F.3d 1066, 1072 (Fed. Cir. 2002). *See Battles v. City of Ft. Myers*, 127 F.3d 1298, 1300 (11th Cir. 1997). Meehan, Heurlin, J. Grossman, E. Grossman, Daniel J. Artz, and Murray J. Fogler, also perjured themselves on Appeal to the U.S. Court of Appeals. *See* Document 95 captioned *"Motion to Vacate Judgment under* FRCP Rule 60(b)."

Meehan represented the Davidsons in Arizona State Court from 1999-2002. Events related to the lawsuit [Civil Action No. 4:07-cv-00471 in the U.S. District Court Southern District of Texas Houston Division] took place in Texas. Davidsons sustained injuries in Texas.

See ¶ 23 of Document 95 which states,

> The Court is referred to the Affidavit and Exhibits attached to this Motion, for competent evidence that Meehan directed multiple

> communications related to this lawsuit to Davidsons in the Southern District of Texas from October 1999 until May 2000. Davidsons' fax number in Corpus Christi, Texas was 361-949-4927 on October 13, 1999. *See* exhibit #1 (the fax cover sheet bearing the letterhead of Meehan & Associates). Area Code 361 is a Corpus Christi, Texas area code. *See* the Declaration of Michael J. Meehan (Document #41) where it states, '***None of the events related to this matter took place in Texas, I represented Dr. Davidson in Arizona State Court in 2001-2002.***' *See* page 11 of Document #41 for the signature of Meehan's retained counsel, Murray Fogler. The Court is again referred to Document #57 for a copy of the retainer agreement between Davidsons and Meehan ***dated October 13, 1999***. Appellants have detailed the alleged fraud *and the alleged fraud on the Court* with the specificity required by FRCP Rule 9(b).

Petitioners incorporate here by reference *in its entirety* the affidavit of Robert M. Davidson, sworn on oath and signed on April 17, 2008, and filed with Document 98 and the exhibits (circled page #1 thru #55), as direct and concise argument amplifying some of the reasons relied on for allowance of the writ under Supreme Court Rule 10. This affidavit states, *inter alia*,

> These Exhibits include true and correct copies of the following: Meehan's Pleadings Index, Volume 1 for the case Robert Michael

> Davidson, et al ads. Jay Grossman, et al (AZ Superior Court – No. 333954, Our File No. 24155-1, for the period July 2, 1999-November 30, 2000. Meehan's Pleadings Index, Volume 2, for the case Robert Michael Davidson, et al ads. Jay Grossman, et al. (AZ Superior Court – No. 333954, Our File No. 240831.70010, for the period December 15, 2000-January 11, 2002. [. . . .] File-stamped court document captioned "Stipulation to Extend time to Answer or otherwise plead and to Vacate Application for Default," ***signed by Michael J. Meehan and Bruce R. Heurlin on October 18, 1999***, and file-stamped by Patricia A. Noland, Clerk Superior Court on October 19, 1999, in Pima County Superior Court Case C333954. File-stamped court document captioned "Answer to First Amended Complaint and Counterclaim," ***signed by Michael J. Meehan on April 28, 2000***, and file-stamped by Patricia A. Noland, Clerk Superior Court on April 28, 2000, in Pima County Superior Court Case C333954. File-stamped court document captioned "Stipulation for Order of Continuance of Trial," ***signed by Michael J. Meehan and Bruce R. Heurlin on November 29, 2000***, and file-stamped by Patricia A. Noland, Clerk Superior Court on November 29, 2000, in Pima County Superior Court Case C333954. [*et seq.*]

Jay Grossman ("Grossman") was an employee of Albany Medical College Allergy Division in the early 90's. Albany Medical College ("AMC") and Anthony P.

Tartaglia ("Tartaglia") are thought to have played a direct role in facilitating the *"relocation"* of Grossman's clinical *"research"* practice from Albany, NY to Tucson, AZ during an ongoing FDA inspection of his federally-regulated conduct. At the time of his relocation, Grossman is known to have been involved in a lawsuit with three physicians. In a sworn affidavit, Richard Ball, M.D., Scott Osur, M.D. and David Shulan, M.D., made accusations of ***violence*** by Grossman and clinical ***research fraud*** by Grossman, in Albany County Case #2960-91. AMC and Tartaglia had actual knowledge, both of the lawsuit and of the allegations of Grossman's research frauds and violence. Grossman subsequently committed serial acts of extortion, retaliation, assault, battery, obstruction of justice upon various members of the clinical research staff (including Davidson) in Tucson, AZ at 698 E. Wetmore Road from on or about September 1, 1998, until on or about May 12, 1999.

Extortion is a crime of violence. Grossman's conduct in both Albany, NY and Tucson, AZ was criminal. Davidson should not have been placed *in harms way* by AMC, Tartaglia, and the coconspirators in this case. AMC and Tartaglia, *and others*, had a duty to report Grossman's misconduct to federal authorities. Instead, AMC, Tartaglia, *and others*, acting by agreement and in concert with Grossman, committed numerous overt acts *and omissions* to conceal *ongoing clinical research frauds* at AMC. AMC, Tartaglia, *and others*, had actual knowledge that Grossman was violent. AMC, Tartaglia, *and*

others, had actual knowledge that Grossman was committing serial clinical research frauds in Albany, NY. Grossman and Thomas B. Edwards, M.D. ("Edwards") are thought to have had contractual relationships with AMC. So too did Timothy G. Wighton (Vivra V.P., Clinical Research) ("Wighton"), and the named defendants to the cause of action presently before this Court, have actual knowledge that Grossman was violent, both in Albany, NY and, subsequently, in Tucson, AZ. The senior management of the "*Vivra*" association-in-fact enterprise (Charles W. Ott, Kent J. Thiry, Joseph C. Mello, and Anthony P. Tartaglia) had actual knowledge that Grossman was violent, both in Albany, NY and, subsequently, in Tucson, AZ. *Wighton is known to have had an affiliation with AMC and Wighton can be placed in Albany, NY (10 Madison Place) at approximately the same time frame that Grossman was in Albany, NY.* William H. Ziering, M.D. (convicted for clinical research fraud) is known to have had a medical license from the state of New York. Joanne C. Wray is known to have been affiliated with Ziering in Fresno, CA. *By information and belief,* Petrillo can be placed in Latham, NY (10 Biscayne Drive) in approximately the same time frame that Wighton and Grossman were in Albany, NY.

Robert M. Davidson ("Davidson") detrimentally relied upon the so-called "ZERO TOLERANCE POLICY" and the policy regarding violence in the workplace found in the Vivra Employee's Handbook. The Court is referred to the transcript from the Dallas

hearing held on January 4, 2007, before Honorable U.S. District Judge Barbara M. G. Lynn in Dallas, Texas in Case 3:06-cv-00920 (1 Hr 30 Mins). A true and correct complete copy of the transcript is found at Document 14-5 filed on 04/06/2007, in Case 4:07-cv-00471. At the Court Reporter's page 18, it states, "*How – which Vivra entity were we primarily injured by, it was – front end it was the fraudulent hiring and retention and lulling inducements that preceded the [state] action. That's where the majority of our injuries took place.*" [THE COURT]: "*Well, you – as I read your complaint, that's all the injury that you claim. Not part. All. You have a significant claim, and I made my preliminary remarks because it's important to me, . . .* "

Assuming *arguendo*, that Davidsons' Amended Complaint in the U.S. District Court Northern District of Texas (Document 57 in Case 3:06-cv-00920), failed to state a RICO claim for *inter alia* fraudulent hiring and retention inducements, an assertion that Davidsons strongly opposed in their Motion to Alter or Amend Judgment under FRCP 59(e) (Document 61 in Case 3:06-cv-00920), Davidsons' Amended Complaint (Document 19) in the U.S. District Court Southern District of Texas (Case 4:07-cv-00471), corrected any alleged pleading deficiencies, added several substantively new Counts (Count Five, Count Six, and Count Seven), and impleaded several additional new Defendants.

Propinquity, "*study buddies*," and the Prescription Drug User Fee Act were essential elements of the enterprise in the case presently before this Court. In

both Albany, NY and Tucson, AZ, propinquity of their clinical research business with their specialty medical practices permitted facile *cross-over* of patients into research studies via fraudulent "*pre-screens*" [pulmonary function tests ("PFTs")]. *See* the Schematic diagram found at pages 8-10 of 11 of Document 16-6 in Case 4:07-cv-00471. *See* ¶s 73-74 at pages 33 and 34 of Document 1 in *closely-related* U.S. District Court Case 4:07-cv-01530, *United States Of America, ex rel., Robert Davidson, M.D. v. Davita, Inc., Center, et al.*(U.S. District Court Southern District of Texas case 4:07-cv-01530) filed May 4, 2007. *See* Appendix H and I. *Bribery* is a predicate act of racketeering under the RICO statute. The User Fees under the PDUFA are bribes. By delaying the publication of the FDA Tucson, AZ EIR of 5/5-6/28/99, the PDUFA II substantially delayed the time at which Davidsons could begin to seek a legal remedy against Defendants. This "*delay*" was intentional and directly targeted at Davidson. ***It was readily foreseeable that this "delay" would result in wasted legal expenses, loss of current employment, loss of prospective legitimate employment opportunities, and damage to Davidsons' reputation.***

Davidsons were deprived of their fundamental right to equality of treatment before the law under the Ninth Amendment of the U.S. Constitution. The "*delay*" and *extraordinary process* faced by Davidson in his interaction with FDA violated Davidson's equal protection rights. Davidsons have alleged interference with a fundamental right by FDA

and Sepracor Inc, motivated by bribery. The FDA treated Davidson differently from other similarly situated clinical research subinvestigators because Davidson exercised his right to equality of treatment before the law by "*blowing the whistle*" on Grossman *for patient safety concerns.* The selective treatment of Davidson by FDA and Sepracor was based on impermissible considerations (bribery of FDA by Sepracor) and to inhibit and punish Davidson's exercise of his Ninth Amendment fundamental right to equality of treatment before the law.

Davidson alleges predicate act injury, substantive RICO injury, enterprise injury, and conspiracy injury to their business and property. Serial, related fraudulent hiring, retention, and lulling inducements, were *directly* targeted at Davidson ***and relied upon by Davidson***. *Anza v. Ideal Steel Supply Corp.*, 126 S.Ct. 1991, 1994 (2006). A number of Davidson's injuries (assault, battery, extortion, retaliation, constitutional violation) *preceded* injury to the United States, making Davidson the directly injured party, *not the United States.* A number of Davidson's injuries (certain predicate act injuries, substantive RICO injuries, enterprise injuries, and conspiracy injuries) occurred *concomitantly* with injury to the United States, *making both Davidson and the United States* directly injured parties. There is no conceptual difficulty with the view that injuries can occur *in parallel*, as well as *in series*. If they occur in parallel, there can be *more than one* directly injured party.

The Affidavit and Exhibits included in the Amended Complaint (Document 19 in Case 4:07-cv-00471) provide competent evidence "*plausibly* suggesting *inter alia* the existence of a conspiracy, enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. This evidence also plausibly suggests violations of 18 U.S.C. § 1952 and 18 U.S.C. § 201 by AMC, Tartaglia, *and others,* in Albany, NY, and provides probable cause to proceed with discovery. This evidence also plausibly suggests that clinical research coordinator, Donald R. Jones, was victim of Grossman's violations of 18 U.S.C. § 1951, § 1512, and § 1513, at AMC, in Albany, NY. *See* Document 19-2 at pages 19, 21, 23, and 24. This misconduct is *virtually identical (similar motive, method, and victim)* to the misconduct by Grossman alleged by Davidson (*and others*) to have occurred in Tucson, AZ.

18 U.S.C. § 1965(a), (b), and (d), and the Fifth Amendment of the U.S. Constitution are the relevant statutes governing the District Court's personal jurisdiction (and venue) over defendants AMC and Tartaglia. There is no impediment to prosecution of a civil RICO action in a court foreign to some defendants if there is a showing that the "*ends of justice*" so require. *See Bernstein v. IDT Corp.*, 582 F.Supp. 1079 (D.Del. 1984). The *ends of justice* do so require in the case presently before this Court.

The Fifth Circuit Order (PER CURIAM) of February 28, 2008 (Appendix G at App.16) states *inter alia*, "IT IS FURTHER ORDERED that the motion of

appellees Jay Grossman, Eudice Grossman, and Bruce Heurlin for sanctions prohibiting the appellants from filing further appeals or civil actions against any of the appellees in this case in any federal court without first providing proof that all of the aforesaid damages and costs awarded by this court under FRAP 38 have been paid in full is GRANTED.

The Order (Appendix G) of February 28, 2008, by the Fifth Circuit Court of Appeals, imposed sanctions against the Davidsons which *effectively* prohibits[2] the appellants [the Davidsons] from timely-appealing within the 30-day statutory time limit from the District Court's Order (Document 96) (Appendix C).

The Order (Appendix G) of February 28, 2008, by the Fifth Circuit Court of Appeals and the Order (Appendix B) of April 22, 2008, by the District Court, have *effectively* impaired Davidsons access to *any* federal court, *except perhaps to this Court*. Davidsons' right to file Motion to Vacate Judgment under Rule 60(b) (Document 95) was statutory and time-limited.

Issue 1: Whether the Fifth Circuit Judgment affirming the dismissal of Petitioners' lawsuit for

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[2] The Grossmans (Jay and Eudice) through their retained legal counsel (Daniel J. Artz) filed a garnishment action in Gregg County, TX Case No. 2005-93-A on or about January 29, 2008, of the operating bank account of Davidsons' medical practice in Longview, TX, which forced Davidson to *immediately* close his Longview, TX medical practice on February 1, 2008, and seek new employment.

improper venue denied Petitioners' right to Due Process and Equal Protection.

The Fifth Circuit U.S. Court of Appeals affirmation without opinion (and granting sanctions) denied Davidsons Due Process *and Equal Protection* (impairing right of access to the courts) rights under the Fifth Amendment of the U.S. Constitution. Davidsons incorporate here by reference ¶s 9-17 of Document 98.

This final judgment deprived both Davidsons and the United States of Constitutional Due Process by impairing their right of access to the courts. This final judgment was so vague as to prevent even the Honorable District Judge from certainty as to whether the Fifth Circuit rejected Davidsons' arguments on appeal. Instead of guidance from the Appellate Court, the District Judge was *apparently* confused by the vagueness of the Appellate ruling.

Wide variations between the U.S. Circuit Courts of Appeal regarding the use of AWO's, and their constitutional significance under Equal Protection, provides a compelling reason for granting review on this writ of certiorari. At least when the Ninth Circuit issued rulings (Ninth Circuit Court of Appeals Case 04-15304 and Case 03-17342) which affirmed the holdings of the District Court (Arizona district), their unpublished opinions provided written opinions supported by cited authorities. *See* Document 83-6 (filed on 10/22/2007) at pages 20-24 of 40.

The Judgment of March 6, 2008, and sanctions by the Fifth Circuit United States Court of Appeals, deprived Davidsons of their right to due process under the U.S. Constitution. The Fifth Circuit U.S. Court of Appeals' Orders (Documents 85, 86, and 87) (Appendix G, F, E) impair Davidsons' time-limited, statutory right to appeal from the District Court's Order (Document 96) (Appendix C) filed on April 9, 2008, and from the District Court's Order (Document 99) (Appendix B) filed on April 22, 2008.

Appellants' First Motion for Declaratory Judgment was *received but not filed* by the Clerk of the Fifth Circuit. Similarly, Appellants' Second Motion for Declaratory Judgment was *received but not filed* by the Clerk of the Fifth Circuit. *See* Appendix J and R. ***Davidsons were denied Due Process under the Fifth Amendment by the selective non-docketing of Appellants' First Motion for Declaratory Judgment and Appellants' Second Motion for Declaratory Judgment. This decision not to file these Motions was based on a faulty interpretation of the federal Declaratory Judgment Act.*** "*Any court of the United States*" may render a declaratory judgment. 28 U.S.C. § 2201(a) (*see* Appendix J and R). The issues underlying the declaratory relief sought in these motions have been *thoroughly* briefed and are ripe for this Court to grant certiorari.

Issue 2: Whether the District Court abused its discretion when it denied Davidsons' Motion to Vacate Judgment Under Rule 60(b) and denied Davidsons' Motion to Alter or Amend Judgment Under Rule 59(e).

Davidsons incorporate here *in its entirety* by reference, Motion to Vacate Judgment Under Rule 60(B) (Document 95). Davidsons incorporate here *in its entirety* by reference, Davidsons' Motion to Alter or Amend Judgment Under Rule 59(e) (Document 98). The District Court's failure to conduct a plenary review of the *new evidence* and *extraordinary circumstances* did not exercise its discretion. *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988). " . . . a denial of Rule 60(b) relief should be reversed if it is based on an error of law. This is consistent with the abuse of discretion standard." *Stokors S.A. v. Morrison*, 147 F.3d 759, 761 (8th Cir. 1998). "A district court necessarily abuses its discretion if it bases its decision on *an erroneous view of controlling law*." The District Court based its decision on an erroneous view of controlling law in the Order (Appendix C) of April 9, 2008. *See* App. 5 and App. 6, where it states,

> This case is before the court on Plaintiffs' Motion to Vacate Judgment Under Rule 60(b) ("Motion") [Doc. #95]. FN1 Plaintiffs allege that the Court's decision dismissing this case for improper venue, a decision that has been affirmed by the United States Court of Appeals for the Fifth Circuit, was based on fraud or is void. Plaintiffs raised these same allegations before the Fifth Circuit during the appeal. *See*, e.g., Motion, ¶ 17. Finding no merit in Plaintiff's arguments, ***and*** finding that the arguments were presented to and ***apparently*** rejected by the Fifth Circuit, it is

> hereby ORDERED that the Motion to Vacate Judgment [Doc. #95] is DENIED. [boldface, italics, and underline added for emphasis]

The District Judge was *apparently* confused by the vagueness of the Appellate ruling. ***The District Court's rulings (Appendix B and C) were both based on the District Court's incorrect interpretation of the Fifth Circuit's AWO. This is not harmless error. This error greatly prejudiced Davidsons' lawsuit and directly caused actual damages (filing fees and bond for costs on appeal).*** The Fifth Circuit's AWO of March 6, 2008, was more than just an AWO, because it was preceded by three separate orders which granted monetary sanctions and sanctions against filing new lawsuits or appeals *in any federal court until the money judgments have been paid. See* Appendix E, F, and G.

The District Court (Houston) appears to be following the lead of the Fifth Circuit Court of Appeals, by issuing its own "*opinions without reasons.*" *See* Appendix B, C, and D. "*Finding no merit on Plaintiff's arguments*, it is hereby ORDERED . . . ," and "*Finding no merit in Plaintiff's arguments*, and finding that the arguments were presented to and *apparently* rejected by the Fifth Circuit, it is hereby ORDERED. . . ."

The District Judge's use of the conjunctive "*and*," along with use of the word "*apparently*" provides this Court with a very striking example of how the widespread use of unpublished nonopinions by the Fifth

Circuit has amplified the confusion found in an AWO. The uncertainty of "*opinions without reasons*" has propagated from the appellate court to the district court, to the direct detriment of the Davidsons. Davidsons have been deprived of more than just procedural due process by the Fifth Circuit and the District Court. Davidsons have been deprived of property (sanctions, bond for costs on appeal, filing fees) without the due process and equal protection guarantee found in the Fifth Amendment of the U.S. Constitution. With these rulings by the Court of Appeals and the District Court, Davidsons have been *effectively* denied their fundamental right of access to the courts.

Issue 3: Whether the Court's decision dismissing this case for improper venue, a decision that has been affirmed by the United States Court of Appeals for the Fifth Circuit, was based on fraud or is void.

Davidsons raised the issue of whether the U.S. District Court (Houston) decision dismissing this case for improper venue was based on fraud or is void, both *during* appeal and *after* appeal. The U.S. District Court erred (Appendix C) in denying Davidsons' Motion to Vacate the Final Order. The U.S. District Court erred (Appendix B) in denying Davidsons' Motion to Alter or Amend Judgment.

Davidsons properly raised the issue of procedural impropriety on appeal in Point of Error One, Four, and Six of Opening Brief. This procedural impropriety deprived the District Judge of subject matter

jurisdiction over this lawsuit. **This is not harmless error. This error greatly prejudiced Davidsons' lawsuit and directly caused actual damages (filing fees and bond for costs on appeal).** The greater procedural protections afforded by Rule 56 appropriately protect plaintiffs who, in truth, are facing challenges to the merits of their complaints. *Garcia v. Copenhaver, Bell, and Associates,* 104 F.3d 1256 (11th Cir. 1997). By denying Davidsons the greater procedural protections afforded by Rule 56 (a hearing and ten-day notice of a hearing), the District Court (Houston) denied Davidsons due process under the Fifth Amendment. ***Judgments entered without affording litigants due process represent a failure of subject matter jurisdiction.***

Issue 4: Whether the Final Order of District Court dismissing Petitioners' lawsuit for improper venue was an abuse of discretion.

Venue for this lawsuit is proper in the Southern District of Texas. This case was improperly dismissed on that basis. The Final Order which dismissed this case for improper venue was procured by fraud or is void. Davidsons' Amended Complaint stated a claim for relief under the RICO act. Venue is proper in the Southern District under 28 U.S.C. § 1391(b)(2), § 1391(b)(3), 18 U.S.C. § 1965, and the Texas Long-Arm statute. The District Court's holdings as to *res judicata* and statute limitations are erroneous for all of the reasons detailed in Issues 1 and 2 of Davidsons' Reply Brief. The statute of limitations is tolled under federal *equitable estoppel*.

This Court is expressly urged to see ¶s 36, 37, 59, and 60 at pages 9, 14, 15 of Plaintiffs' Original Complaint in the U.S. District Court for District of Arizona Case No. 03-cv-580-TUC-FRZ. True and correct copies of pages 9, 14, and 15 of Plaintiffs' Original Complaint are found attached to Document 95 (at circled page numbers 101-104 found at the bottom right hand corner). These exhibits all bear the header from the PACER website for Case 4:07-cv-00471, Document 83-5, filed on 10/22/2007. These exhibits are material to the issue of tolling the statute of limitations (equitable tolling and equitable estoppel) raised on appeal in Point of Error One, Four, and Six of Opening Brief, and in Issue One at pages 1-11 of Reply Brief.

The District Court (Dallas) "*holdings*" with respect to 28 U.S.C. § 1391(b) refer to the Northern District of Texas, *not to the Southern District of Texas*. *Mowbray v. Cameron County, Tex.*, 274 F.3d 269, 281 (5th Cir. 2001). Although judgment merely adjudging remedy to be barred may operate as judgment in bar in forum that rendered it, *it will not have such operative effect in another forum whose remedial law authorizes recovery.* Moore's Federal Practice, supra at ¶ 0.405[1]. The District Court (Houston) "*holdings*" with respect to 28 U.S.C. § 1391(b) *refer to the Southern District of Texas*, not the Northern District of Texas. These "*holdings*" were not necessary to the judgment, once the District Court (Houston) accepted the *res judicata* and statute of limitations allegations in the Defendants' *multiple* Rule 12(b) motions.

Moreover, ***these "holdings" with respect to 28 U.S.C. § 1391(b) are based <u>in part</u> upon the perjury of Meehan with respect to material jurisdictional facts.***

There are no facts in the record of this lawsuit which would suggest that the diverse defendants were all subject to venue in a single state. There is no district in which this action may otherwise be brought. *See* App. 35 of Appendix N, where it states, *"The final section, §1391(b)(3), would permit venue in this district only if there is 'no district in which the action may otherwise be brought.' Because this lawsuit could be brought in Arizona where a substantial part of the events occurred, § 1391(b)(3) does not permit venue in this district. Plaintiffs have not shown that venue in this district is proper under 28 U.S.C. § 1391(b)(3).* ***Here the District Judge has incorrectly applied the governing legal authorities to the facts. This is not harmless error. This error greatly prejudiced Davidsons' lawsuit and <u>directly</u> caused actual damages (filing fees and bond for costs on appeal).*** *See* Appendix D. *See* page 2 of Document 45-2, where it states, *"There shall be no further filings in this Action." Davidsons were absolutely prevented from ever refiling in Arizona.*

Davidsons' Motion (Document 98) *"call[s] into question the correctness of [the] judgment." Templet v. Hydrochem, Inc.*, 367 F.3d 473, 478 (5th Cir. 2004). Venue in this District is proper. ***The case was improperly dismissed on that basis.*** Davidsons

incorporate here by reference the argument and authorities found in Davidsons' Motion to Vacate Judgment under FRCP Rule 60(b) (Document 95). The Court's prior ruling was incorrect, improper, and, as a result, Plaintiffs' Motion to Alter or Amend Judgment under FRCP Rule 59(e) (Document 98) should have been granted.

Relief will lie on a motion from a judgment produced by perjury. *In re Intermagnetics America, Inc.*, 926 F.2d 912 (9th Cir. 1991); *Lim Kwock Soon v. Brownell*, 369 F.2d 808, noted 1967, 21 Sw.L.J. 339. D.C. Tex. 1966, 253 F.Supp. 963 (5th Cir. 1966). Refusal to vacate a judgment by the district court on a motion that asserted that the judgment had been obtained by fraudulent practices by means of which perjured testimony had been procured and that was supported by affidavits and the indication that the witnesses were willing to testify after having been warned of their constitutional rights was not an exercise of sound legal discretion. *Peacock Records, Inc. v. Checker Records, Inc.*, 365 F.2d 145, *cert. denied*, 87 S.Ct. 707, 385 U.S. 1003, 17 L.Ed.2d 542 (7th Cir. 1966); *Plattner v. Strick Corp.*, 102 F.R.D. 612, 614 (D.C. Ill. 1984), citing Wright & Miller.

CONCLUSION

Petitioners pray that this Court issue a Writ of Certiorari, to declare the use of AWO's with sanctions facially unconstitutional, or unconstitutional as

applied to Petitioners; to declare ARCP 5.1 facially unconstitutional, or unconstitutional as applied to Petitioners; to declare the Prescription Drug User Fee Act to be unconstitutional as applied to Petitioners; to reverse the dismissal of this lawsuit on the merits; and to grant Petitioners such other and further relief as it may deem to be just and equitable.

Respectfully submitted,

ROBERT M. DAVIDSON
VANESSA E. KOMAR

Petitioners Pro Se
P.O. Box 1785
Kilgore, TX 75663
903-235-0731

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20650
Summary Calendar

ROBERT M DAVIDSON; VANESSA E KOMAR

Plaintiffs-Appellants

v.

JAY GROSSMAN; EUDICE GROSSMAN; GAYLE F PETRILLO; CHARLES OTT; JOANNE C WRAY; KENT J THIRY; JOSEPH C MELLO; MICHAEL J MEEHAN; BRUCE R HEURLIN; ANTHONY P TARTAGLIA; DVA RENAL HEALTHCARE, INC; ALBANY MEDICAL COLLEGE; VIVRA HOLDINGS, INC; GAMBRO HEALTHCARE, INC; DAVITA, INC; SEPRACOR, INC

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:07-CV-471

(Filed Mar. 6, 2008)

Before WIENER, GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:*

AFFIRMED; all pending motions or requests by appellants are denied. *See* Fifth Circuit Local Rule 47.6.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ROBERT M. DAVIDSON, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	CIVIL ACTION NO.
v.	§	H-07-0471
	§	
JAY GROSSMAN, *et al.*,	§	
	§	
Defendants.	§	

ORDER

(Filed Apr. 22, 2008)

This case is before the Court on Plaintiffs' Motion to Alter or Amend Judgment Under Rule 59(e) ("Motion") [Doc. # 98]. Plaintiffs allege "manifest error of law, fact, and newly discovered evidence." Finding no merit on Plaintiff's arguments, it is hereby

ORDERED that the Motion [Doc. # 98] is **DENIED**. It is further

ORDERED that Plaintiff may not file any additional motions in this case unless and until they have paid in full the attorneys' fees and costs imposed by the United States Court of Appeals for the Fifth Circuit. *See* Docs. # 85, # 86, and # 87. Any motions filed in violation of this order will be stricken.

SIGNED at Houston, Texas, this **22nd** day of **April, 2008**.

/s/ Nancy F. Atlas
Nancy F. Atlas
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ROBERT M. DAVIDSON, *et al.*, Plaintiffs,	§	CIVIL ACTION NO. H-07-0471
v.	§	
JAY GROSSMAN, *et al.*, Defendants.	§	

ORDER

(Filed Apr. 9, 2008)

This case is before the court on Plaintiffs' Motion to Vacate Judgment Under Rule 60(b) ("Motion") [Doc. # 95].[1] Plaintiffs allege that the Court's decision dismissing this case for improper venue, a decision that has been affirmed by the United States Court of Appeals for the Fifth Circuit, was based on fraud or is void. Plaintiffs raised these same allegations before the Fifth Circuit during the appeal. *See, e.g.*, Motion,

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[1] The Fifth Circuit ordered Plaintiffs to pay Defendants' attorneys' fees and costs. *See* Docs. # 85, # 86, and # 87. The Fifth Circuit further ordered that Plaintiffs were not to file "further appeals or civil actions" against any of the Defendants in any federal court without first providing proof that Plaintiffs had paid the fees and costs. *See* Doc. # 85. This Court does not express any opinion regarding whether Plaintiffs' filing of the Motion to Vacate is in violation of the Fifth Circuit's orders.

¶ 17. Finding no merit in Plaintiff's arguments, and finding that the arguments were presented to and apparently rejected by the Fifth Circuit, it is hereby

ORDERED that the Motion to Vacate Judgment [Doc, #95] is **DENIED**.

SIGNED at Houston, Texas, this **9th** day of **April, 2008**.

/s/ Nancy F. Atlas
Nancy F. Atlas
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ROBERT M. DAVIDSON and VANESSA E. KOMAR,	§	
Plaintiffs	§	**CASE NO. H-07-CV-0471**
vs.	§	
JAY GROSSMAN, ET AL,	§	
Defendants.	§	

ORDER ON JOINT MOTION TO DISTRIBUTE BOND FOR COSTS

(Filed Apr. 10, 2008)

CAME ON FOR CONSIDERATION the Joint Motion of Defendants to Distribute Plaintiffs' Bond for Costs, filed herein by Defendants Jay Grossman and Eudice Grossman and Bruce Heurlin (collectively, the "***Grossman Defendants***") and Defendants Gayle F. Petrillo, Charles W. Ott, Kent J. Thiry, Joseph C. Mello, DVA Renal Healthcare, Inc., Vivra Holdings, Inc., Gambro Healthcare, Inc., and Da Vita, Inc. (collectively, the "***Gambro Healthcare Defendants***"), and Defendants Albany Medical College and Anthony Tartaglia (collectively, the "***Albany Medical Defendants***"), and Defendant Sepracor, Inc. ("***Sepracor***"). The Court, having considered the pleadings, finds that the Joint Motion is well founded, and should be granted;

IT IS THEREFORE ORDERED, that the Clerk of the Court is hereby ordered to distribute the Bond For Costs posted herein on October 1, 2007 (Clerk's Receipt No. 4585399) by Plaintiffs Robert M. Davidson and Vanessa E. Komar in the amount of $2,000.00 as follows:

A. To Marcia E. Kurtz, Esq., Bracewell & Giuliani LLP, 711 Louisiana, Suite 2300, Houston, TX 77002, as counsel for the Gambro Healthcare Defendants, the sum of $638.42, being the allowed costs of the Gambro Healthcare Defendants, plus one-third of the balance of the Cost Bond after payment of all allowed costs;

B. To Daniel J. Artz, Esq., Law Office of Daniel J. Artz, 436 East Tripp Road, Sunnyvale, Texas 75182, as counsel for the Grossman Defendants, the sum of $690.17, being the allowed costs of the Grossman Defendants, plus one-third of the balance of the Cost Bond after payment of all allowed costs;

C. To Brian J. Butler, Esq., Bond Schoeneck & King, PLLC, One Lincoln Center, Syracuse, NY 13202, as counsel for the Albany Medical Defendants, the sum of $590.41, being one-third of the balance of the Cost Bond after payment of all allowed costs; and

D. To Sandra F. Palmer, Esq., Sidley Austin LLP, 1501 K Street NW, Washington, D.C. 20005-1401, as counsel for Defendant Sepracor, the sum of $81.00, being the allowed costs of Defendant Sepracor.

In the event that there has been any interest earned on such Bond for Costs, any such interest shall be divided equally and added to the amounts specified in Paragraphs A., B., and C. above.

IT IS FURTHER ORDERED, that Plaintiffs shall remain fully liable to the Gambro Healthcare Defendants, the Albany Medical Defendants, and Defendant Sepractor for the full amount of the attorneys' fees and expenses and double costs awarded to them by the Fifth Circuit Court of Appeals, as follows:

(a) The Gambro Healthcare Defendants, attorneys' fees and expenses in the amount of $35,687.09, plus doubled costs in the amount of $96.00, for a total of $35,783.09;

(b) The Grossman Defendants, attorneys' fees and expenses in the amount of $12,645.39, plus doubled costs in the amount of $199.25, for a total of $12,844.64; and

(c) The Albany Medical Defendants, attorneys' fees and expenses in the amount of $7,852.00; and

(d) Defendant Sepracor, doubled costs in the amount of $162.00,

subject to credit for the sums to be paid out of the Plaintiffs' Bond for Costs. The Plaintiffs' liability for such sums shall constitute a money judgment of this Court, and Clerk of the Court is hereby authorized to issue execution against Plaintiffs pursuant to Federal Rule of Civil Procedure 69 upon the request of any of

the Gambro Healthcare Defendants, the Albany Medical Defendants, and Defendant Sepracor in aid of the collection of such sums.

ENTERED this 9th day of April, 2008.

/s/ Nancy F. Atlas
THE HONORABLE NANCY F. ATLAS,
UNITED STATES DISTRICT JUDGE

(SEAL)

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20650

ROBERT M DAVIDSON; VANESSA E KOMAR

Plaintiffs-Appellants

v.

JAY GROSSMAN; EUDICE GROSSMAN; GAYLE F PETRILLO; CHARLES OTT; JOANNE C WRAY; KENT J THIRY; JOSEPH C MELLO; MICHAEL J MEEHAN; BRUCE R HEURLIN; ANTHONY P TARTAGLIA; DVA RENAL HEALTHCARE, INC; ALBANY MEDICAL COLLEGE; VIVRA HOLDINGS, INC; GAMBRO HEALTHCARE, INC; DAVITA, INC; SEPRACOR, INC

Defendants-Appellees

Appeal from the United States
District Court for the
Southern District of Texas, Houston

(Filed Mar. 26, 2008)

Before WIENER, GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the motion of appellees Albany Medical College and Anthony P. Tartaglia for an award of attorney's fees and costs is GRANTED.

IT IS FURTHER ORDERED that attorney's fees of $7,430.00 and costs of $442.00, totaling $7,852.00, be paid forthwith to these appellees, from the Bond for Costs heretofore posted with the district court by appellants if necessary.

IT IS FURTHER ORDERED that attorney's fees of $11,750.00 and costs of $895.39, totaling $12,645.39, be paid forthwith to appellees Jay Grossman, Eudice Grossman, and Bruce Heurlin, also from said Bond for Costs if necessary.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20650

ROBERT M DAVIDSON; VANESSA E KOMAR

Plaintiffs-Appellants

v.

GAYLE F PETRILLO; CHARLES OTT; JOANNE C WRAY; KENT J THIRY; JOSEPH C MELLO; MICHAEL J MEEHAN; DVA RENAL HEALTHCARE INC; VIVRA HOLDINGS INC; GAMBRO HEALTHCARE INC; DAVITA INC; SEPRACOR INC

Defendants-Appellees

Appeal from the United States
District Court for the
Southern District of Texas, Houston

(Filed Mar. 26, 2008)

Before WIENER, GARZA, and BENAVIDES, Circuit Judges..

PER CURIAM:

IT IS ORDERED that the motion of appellees, Gayle F. Petrillo, Charles W. Ott, Kent J. Thiry, Joseph C. Mello, DVA Renal Healthcare, Inc., Vivra Holdings, Inc., Gambro Healthcare, Inc., and DaVita, Inc., for an award of attorney's fees in the sum of $34,894.25 and $792.84 costs, totaling $35,687.09 is GRANTED, same to be paid forthwith from the Bond for Costs heretofore posted with the district court by appellants if appropriate.

IT IS FURTHER ORDERED that the motion of appellees, Gayle F. Petrillo, Charles W. Ott, Kent J. Thiry, Joseph C. Mello, DVA Renal Healthcare, Inc., Vivra Holdings, Inc., Gambro Healthcare, Inc., and DaVita, Inc., for sanctions barring appellants Robert M. Davidson and Vanessa E. Komar from filing suit against the appellees absent proof that all damages awarded by the Court have been paid is GRANTED.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20650

ROBERT M DAVIDSON; VANESSA E KOMAR

Plaintiffs-Appellants

v.

JAY GROSSMAN; EUDICE GROSSMAN; GAYLE F PETRILLO; CHARLES OTT; JOANNE C WRAY; KENT J THIRY; JOSEPH C MELLO; MICHAEL J MEEHAN; BRUCE R HEURLIN; ANTHONY P TARTAGLIA; DVA RENAL HEALTHCARE INC; ALBANY MEDICAL COLLEGE; VIVRA HOLDINGS INC; GAMBRO HEALTHCARE INC; DAVITA INC; SEPRACOR INC

Defendants-Appellees

Appeal from the United States
District Court for the
Southern District of Texas, Houston

(Filed Feb. 28, 2008)

Before WIENER, GARZA, and BENAVIDES, Circuit Judges..

PER CURIAM:

IT IS ORDERED that the motion of appellees, Jay Grossman, Eudice Grossman, and Bruce Heurlin for attorneys' fees incurred in connection with this appeal is GRANTED in an amount to be determined following appellees' submission, within 15 days following the filing of this order, of documentation substantiating the proper quantum of such fees to be assessed as damages under FRAP 38.

IT IS FURTHER ORDERED that the motion of appellees, Jay Grossman, Eudice Grossman, and Bruce Heurlin for double costs, which may be recovered under FRAP 38 from the Bond for Costs that the appellants posted with the district court, is GRANTED.

IT IS FURTHER ORDERED that the motion of appellees Jay Grossman, Eudice Grossman, and Bruce Heurlin for sanctions prohibiting the appellants from filing further appeals or civil actions against any of the appellees in this case in any federal court without first providing proof that all of the aforesaid damages and costs awarded by this court under FRAP 38 have been paid in full is GRANTED.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

UNITED STATES OF AMERICA, ex rel, Robert Davidson, MD, Plaintiffs, v. DAVITA, INC., CENTER, et al., Defendants.	§ § § § § § § § §	CIVIL ACTION NO. H-07-1530

ORDER

(Filed Feb. 20, 2008)

In accordance with the Notice of Voluntary Dismissal filed on February 12, 2008 it is hereby ORDERED that this action be dismissed without prejudice, pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure.

SIGNED at Houston, Texas, on this 20th day of February, 2008.

/s/ Sim Lake
SIM LAKE
UNITED STATES
DISTRICT JUDGE

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

UNITED STATES OF AMERICA, *ex rel.* Robert Davidson, MD, Plaintiffs, v. Davita, Inc. Center, et al Defendant.	)	No. H-07-CV-1530 **FILED EX PARTE AND UNDER SEAL**

ORDER

(Filed Feb. 6, 2008)

The United States having declined to intervene in this action at this time pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(4)(B), the Court ORDERS THAT:

1. the Complaint be unsealed;

2. all other contents of the Court's file ~~in this action remain under seal and shall not be made public or served upon any party, except for this Order and the Government's Notice of Election to Decline Intervention, which relator shall serve upon the defendants only after service of the complaint;~~ be unsealed

3. the seal be lifted as to all other matters occurring in this action *after* the date of this Order;

4. the parties shall serve copies of all pleadings and motions filed in this action, including supporting memoranda, upon the United States, as provided for in 31 U.S.C. § 3730(c)(3). The United States may order any deposition transcripts and is entitled to intervene in this action, for good cause, at any time;

5. all Orders of this Court shall be sent to the United States, and that;

6. should the relator or defendants propose that this action be dismissed, settled, or otherwise discontinued, the Court will solicit the written consent of the United States before ruling or granting it approval.

Signed: 2/6/08

/s/ Sim Lake
UNITED STATES
DISTRICT JUDGE

APPENDIX J

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

November 9, 2007

Mr. Robert M. Davidson
Ms. Vanessa E. Komar
P.O. Box 1785
Kilgore TX 75663

Re: 07-20650 *Davidson v. Grossman*
USDC No. 4:07-CV-471

Dear Mr. Davidson and Ms. Komar:

The court has received your First Motion for Declaratory Judgment. This court, as a court of appeals, reviews the judgments of district courts. It does not itself issue declaratory judgments; rather, it determines whether a district court acted correctly in granting or denying a declaratory judgment. Thus, if you sought a declaratory judgment in the district court and it was denied, you may argue in this court that the district court erred. However, the court will take no action on your motion.

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ William C. Zapalac
William C. Zapalac
Counsel to the Clerk's Office
(504) 310-7660

c: Mr. Jason Dean Barth
Mr. Dale Bruce Norman
Mr. Daniel James Artz
Ms. Marcia E. Kurtz
Mr. Paul E. Chronis
Mr. Brian J. Bulter [sic]
Ms. Sandra Palmer
Mr. Murray J. Fogler

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ROBERT M. DAVIDSON, *et al.*, Plaintiffs,	§	CIVIL ACTION NO. H-07-0471
v.	§	
JAY GROSSMAN, *et al.*, Defendants.	§	

ORDER

(Filed Oct. 24, 2007)

This case, currently on appeal to the United States Court of Appeals for the Fifth Circuit, is before the Court on Plaintiffs' "Motion for Indicative Ruling on Plaintiffs' Motion Under Federal Rule of Civil Procedure 60(b)(4) to Set Aside the Final Order" [Doc. # 83] in which Plaintiffs ask the Court to "indicate that it would be inclined to grant Plaintiffs' Motion . . . under FRCP 60(b)(4) to set aside the Final Order as void." Plaintiffs have not formally filed a Rule 60(b)(4) motion, and it is inappropriate for the Court to render advisory opinions. Plaintiffs' request for relief therefore is without merit. Accordingly, it is hereby

ORDERED that Plaintiffs' "Motion for Indicative Ruling on Plaintiffs' Motion Under Federal Rule

of Civil Procedure 60(b)(4) to Set Aside the Final Order" [Doc. # 83] is **DENIED**.

SIGNED at Houston, Texas, this **23rd** day of **October, 2007**.

/s/ Nancy F. Atlas
Nancy F. Atlas
United States District Judge

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ROBERT M. DAVIDSON, *et al.*, Plaintiff,	§	CIVIL ACTION NO. H-07-0471
v.	§	
JAY GROSSMAN, *et al* , Defendants.	§	

MEMORANDUM AND ORDER

(Filed Aug. 14, 2007)

This case is before the Court on Plaintiffs Robert M. Davidson and Vanessa E. Komar's Motion to Alter or Amend Judgment ("Motion") [Doc. # 71]. For the reasons stated herein and in the Court's Memorandum and Order [Doc. # 69] entered July 5, 2007, the Motion is **denied**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Robert M. Davidson and his wife, Vanessa E. Komar, filed this lawsuit *pro se* against Jay Grossman, Eudice Grossman, Gayle F. Petrillo, Charles W. Ott, Joanne C. Wray, Kent W. Thiry, Joseph C. Mello, Michael J. Meehan, Bruce R. Heurlin, Anthony P. Tartaglia, DVA, AMC, Vivra, Gambro, Davita, and Sepracor. Plaintiffs assert three counts of alleged

RICO[1] violations and a variety of other state and federal claims, all stemming from Davidson's employment at a Vivra research facility in Tucson, Arizona.

The first lawsuit in which Plaintiff(s) asserted these claims against some of these Defendants was filed in the United States District Court for the District of Arizona, and was dismissed in November 2003. The dismissal was affirmed by the United States Court of Appeals for the Ninth Circuit. Plaintiffs' petition for a writ of certiorari to the United States Supreme Court was denied, as was Plaintiffs' petition for rehearing. The second lawsuit involving these same claims and some of the same Defendants was filed in the United States District Court for the Northern District of Texas. There, the Honorable Barbara Lynn, dismissed the lawsuit on January 5, 2007.

On February 2, 2007, Plaintiffs filed the same RICO claims against the current Defendants, some of whom were Defendants in Judge Lynn's case. Plaintiffs assert that venue in the Southern District of Texas is appropriate under either 28 U.S.C. § 1391(b)(2) or the special venue provision for RICO claims, 18 U.S.C. § 1965.

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[1] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*

The Court dismissed this third lawsuit for improper venue. Venue was not proper under the general venue statute, 28 U.S.C. § 1391. Plaintiffs were unable to benefit from RICO's special venue provision, 18 U.S.C. § 1965, because Plaintiffs' RICO claims against the Defendants named in the lawsuit in the Northern District of Texas had been dismissed with prejudice and their RICO claims against the Defendants first named in this case were time-barred.

Plaintiffs then filed their Motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. The Motion is now ripe for decision.

II. APPLICABLE LEGAL STANDARD

"A motion to alter or amend judgment must clearly establish either a manifest error of law or fact or must present newly discovered evidence." *Ross v. Marshall,* 426 F.3d 745, 763 (5th Cir. 2005) (internal quotations omitted). This type of motion "calls into question the correctness of a judgment." *Templet v. Hydrochem, Inc.,* 367 F.3d 473, 478 (5th Cir.) (quoting *In re TranstexasGas Corp.,* 303 F.3d 571, 581 (5th Cir. 2002)), *cert. denied,* 543 U.S. 976 (2004). Rule 59(e) motions "cannot be used to raise arguments which could, and should, have been made before the judgment issued [and] cannot be used to argue a case under a new legal theory." *Id.* "[A]n unexcused failure to present evidence available at the time of summary judgment provides a valid basis for denying

a subsequent motion for reconsideration." *Id.* at 479. Importantly, a "Rule 59(e) motion is not proper to relitigate matters that have been resolved to the movant's dissatisfaction and Plaintiff cannot have a 'second bite at the apple' on the same issues that were previously addressed by the parties and this Court." *Alvarado v. Texas Rangers,* 2005 WL 1420846, *2 (W.D.Tex. June 14, 2005). "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet,* 367 F.3d at 479.

III. ANALYSIS

Plaintiffs complain that the Court improperly "converted several motions seeking dismissal for a variety of reasons into essentially an '*omnibus*' motion for summary judgment." *See* Motion, p. 1 (italics in original). Contrary to Plaintiffs' contention, the Court did not convert the motions to dismiss into motions for summary judgment. Instead, the Court ruled on the parties' Motions to Dismiss, in which they asserted improper venue as a basis for dismissal, noting that the RICO claims against certain Defendants were dismissed with prejudice by Judge Lynn and that the RICO claims against the other Defendants were time-barred. For the reasons stated in the Court's prior ruling, venue in this district is improper and the case was correctly dismissed on that basis. As a result, the Motion is denied.

IV. CONCLUSION AND ORDER

Venue is not proper under either the general venue statute, 28 U.S.C. § 1391, or RICO's special venue provision, 18 U.S.C. § 1965. The Court's prior ruling was correct and proper, and, as a result, it is hereby

ORDERED that Plaintiffs' Motion to Alter or Amend Judgment [Doc. # 71] is **DENIED**.

SIGNED at Houston, Texas, this **14th** day of **August, 2007**.

/s/ Nancy F. Atlas
Nancy F. Atlas
United States District Judge

APPENDIX M

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ROBERT M. DAVIDSON, *et al.*, Plaintiff,	§	
v.	§	CIVIL ACTION NO. H-07-0471
JAY GROSSMAN, *et al.*, Defendants.	§	

FINAL ORDER

(Filed Jul. 5, 2007)

For the reasons stated in the accompanying Memorandum and Order, it is hereby

ORDERED that Defendants' Motions to Dismiss [Docs. # 9, # 37, # 39, # 41, and # 42] are **GRANTED** and this case is **DISMISSED** for improper venue. This is a final, appealable order.

SIGNED at Houston, Texas, this 5th day of **July, 2007**.

/s/ Nancy F. Atlas
Nancy F. Atlas
United States District Judge

APPENDIX N

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ROBERT M. DAVIDSON, *et al.*,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION
v.	§	NO. H-07-0471
	§	
JAY GROSSMAN, *et al.*,	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER

(Filed Jul. 5, 2007)

This case is before the Court on several motions seeking dismissal for a variety of reasons. *See* Motion to Dismiss by Anthony Tartaglia and Albany Medical College ("AMC") ("AMC Motion") [Doc. # 9]; Motion to Dismiss by Jay Grossman, Eudice Grossman, and Bruce Heurling [sic] ("Grossman Motion") [Doc. # 18]; Motion to Dismiss by Joseph C. Mello, DVA Renal Healthcare, Inc. ("DVA"), Vivra Holdings, Inc. ("Vivra"), Gambro Healthcare, Inc. ("Gambro"), Davita, Inc. ("Davita"), Gayle F. Petrillo, Charles W. Ott, Kent J. Thiry ("Davita Defendants Motion") [Doc. # 42]; Motion to Dismiss by Sepracor, Inc. ("Sepracor") ("Sepracor Motion") [Doc. # 37]; and Motion to Dismiss by Michael J. Meehan ("Meehan Motion") [Doc. # 41]. Plaintiffs filed a Consolidated Response [Doc. # 56] and an Appendix of exhibits [Doc. # 57].

Replies were filed by Meehan [Doc. # 61], Sepracor [Doc. # 62], and AMC [Doc. # 63]. The Court has carefully reviewed the full record in this case. Based on this review and the application of governing legal authorities, the Court grants the Motions to Dismiss and **dismisses** this case for improper venue as to all defendants.

I. FACTUAL AND PROCEDURAL BACKGROUND

Robert M. Davidson and his wife, Vanessa E. Komar, are currently residents of Texas. They filed this lawsuit *pro se* against Jay Grossman, Eudice Grossman, Gayle F. Petrillo, Charles W. Ott, Joanne C. Wray, Kent W. Thiry, Joseph C. Mello, Michael J. Meehan, Bruce R. Heurlin, Anthony P. Tartaglia, DVA, AMC, Vivra, Gambro, Davita, and Sepracor. Plaintiffs assert three counts of alleged RICO[1] violations and a variety of other state and federal claims.

Plaintiffs' claims all stem from their employment at a Vivra research facility in Tucson, Arizona. Generally, Plaintiffs allege that Defendants conspired to commit insurance and research fraud, and that they fraudulently induced Plaintiffs to accept employment at the Vivra facility. This is the third lawsuit in which Plaintiffs have asserted these claims against some of these Defendants. The first such lawsuit, filed in the

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[1] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*

United States District Court for the District of Arizona, was dismissed in November 2003. The dismissal was affirmed by the United States Court of Appeals for the Ninth Circuit, and Plaintiffs' petition for a writ of certiorari to the United States Supreme Court was denied, as was Plaintiffs' petition for rehearing.

Plaintiffs then filed the same RICO claims against some of the same Defendants in the United States District Court for the Northern District of Texas. There, the Honorable Barbara Lynn, dismissed the lawsuit on January 5, 2007.

Plaintiffs then filed the same RICO claims against the current Defendants, some of whom were Defendants in Judge Lynn's case, on February 2, 2007. Plaintiffs assert that venue in the Southern District of Texas is appropriate under either 28 U.S.C. § 1391(b)(2) or the special venue provision for RICO claims, 18 U.S.C. § 1965.

Defendants argue, *inter alia,* that venue here is improper. Once Defendants have raised a proper objection to venue in this judicial district, Plaintiffs bear the burden of proof to establish that the venue they have chose [sic] is proper. *McCaskey v. Continental Airlines, Inc.,* 133 F. Supp. 2d 514, 523 (S.D. Tex. 2001); *Smith v. Fortenberry,* 903 F. Supp. 1018, 1019-20 (E.D. La. 1995); *French Transit, Ltd. v. Modern Coupon Sys., Inc.,* 858 F. Supp. 22, 25 (S.D.N.Y. 1994). The burden is on the plaintiff to institute an action in the proper place, because "[t]o hold otherwise would

circumvent the purpose of the venue statute – it would give plaintiffs an improper incentive to attempt to initiate actions in a forum favorable to them but improper as to venue." *Delta Air Lines, Inc. v. W. Conference of Teamsters Pension Trust Fund,* 722 F. Supp. 725, 727 (N.D. Ga. 1989). Therefore, Plaintiffs bear the burden to establish that the Southern District of Texas is an appropriate venue for this action.

II. VENUE UNDER 28 U.S.C. § 1391

For venue to be proper where jurisdiction is not founded solely on diversity of citizenship, *except as otherwise provided by law,* a civil action may be brought only in:

> (1) a judicial district where any defendant resides, if all defendants reside in the same State,
>
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or
>
> (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b) (emphasis added).

Plaintiffs do not allege that all defendants reside in the same State. Indeed, Plaintiffs allege that

certain Defendants reside in Arizona, others in California, others New York, and still others elsewhere. Because Defendants reside in different states, Plaintiffs cannot establish venue in this district under 28 U.S.C. § 1391(b)(1).

Plaintiffs allege that a substantial part of the events or omissions giving rise to the claim occurred in the Southern District of Texas.[2] Plaintiffs allege that Defendants defrauded Medicare, Medicaid, and other third party insurers in multiple states including Texas; that they defrauded clinical research subjects in multiple states; that they defrauded specialty practice patients in multiple states; that they defrauded clinical research subinvestigators in multiple states including Texas; that they defrauded clinical research coordinators in multiple states, and that they defrauded the United States. Plaintiffs do not, however, identify any specific conduct giving rise to this lawsuit that allegedly took place in Texas. The insurance, research, and employment fraud was allegedly carried out at a research facility run by Vivra in Tucson, Arizona, where Davidson was employed between 1998 and 1999.[3] Plaintiffs' alleged

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[2] In response to Defendants' motions to dismiss, however, Plaintiffs rely solely on the special venue provision for RICO claims. *See* Consolidated Response, at 9.

[3] Amended Complaint, at 28, ¶ 8.103; *id.* at 30, ¶ 14. Davidson mentions a classified ad in the *Tuscon Citizen* on July 15, 1998 that he claims was intended to induce him into employment, and he alleges that he was constructively terminated on May 11, 1999. It is unclear from the Amended Complaint

(Continued on following page)

injuries stem from their employment at Vivra and, therefore, a substantial part of the events or omissions occurred in Arizona, not in the Southern District of Texas. Consequently, venue pursuant to 28 U.S.C. 1391(b)(2) is not proper in this district.

The final section, § 1391(b)(3), would permit venue in this district only if there is "no district in which the action may otherwise be brought." Because this lawsuit could be brought in Arizona where a substantial part of the events occurred, § 1391(b)(3) does not permit venue in this district. Plaintiffs have not shown that venue in this district is proper under 28 U.S.C. § 1391.

III. VENUE UNDER RICO STATUTE

Plaintiffs maintain that they are entitled to venue in this district pursuant to the RICO statute's special venue provision. That section provides for venue:

> (a) . . . against any person . . . in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.
>
> (b) . . . in any district court of the United States in which it is shown that the ends of justice require that other parties residing in

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when Vanessa Komar, his wife and a nurse at Vivra, began or ended her employment with Vivra.

> any other district be brought before the court. . . .

18 U.S.C. § 1965.

Plaintiffs allege that DVA, Gambro, and Sepracor reside, are found, have an agent, or transact business in the Southern District of Texas.[4] Assuming, without finding, that the allegations regarding the presence of these three Defendants in this district to be true, venue would be proper as against these Defendants under 18 U.S.C. § 1965(a) only if Plaintiffs properly assert a RICO claim against them.

A. RICO Claims Against Defendants In Northern District Case

Plaintiffs' RICO claims, here and in the Northern District of Texas case, are based on insurance and research fraud and fraudulent hiring and retention inducements. The basic elements of a civil RICO claim are (1) a person who engages in (2) a pattern of racketeering activity (3) connected to the acquisition, establishment, conduct, or control of an enterprise. *Abraham v. Singh,* 480 F.3d 351, 355 (5th Cir. 2007). Moreover, RICO Plaintiffs must be the proper Plaintiffs – "the central question [the Court] must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.,* ___ U.S. ___, 126 S. Ct. 1991, 1994 (2006). One is not

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[4] Amended Complaint, at 2, ¶ 2.

a proper RICO plaintiff if the alleged fraud was not directed to that individual. *Id.* at 1997.

Defendants Jay Grossman, Eudice Grossman, Gayle F. Petrillo, Charles W. Ott, AMC, Vivra, Gambro, and Joanne C. Wray were named as Defendants in Plaintiffs' civil RICO case in the Northern District of Texas. In that case, Judge Lynn issued an oral ruling, holding that Plaintiffs did not state a direct injury flowing from the alleged insurance and research fraud and, as a result, Plaintiffs' only RICO injury arose, if at all, from the alleged fraudulent inducement leading to the 1998 hiring of Davidson to work at the Vivra facility. Judge Lynn then held that the allegedly fraudulent hiring was "essentially a single act . . . that does not establish a predicate act under RICO." *See* Transcript of Hearing Before Judge Lynn, Exh. 4 to Doc. # 14, p. 51. Having held that Plaintiffs failed to state a viable RICO claim against the named Defendants, Judge Lynn ruled that venue was not proper in the Northern District of Texas and dismissed the case. Because the venue ruling was based on her holdings regarding the civil RICO claims, Judge Lynn clearly advised Plaintiffs that the dismissal was "with prejudice to refiling based on these allegations." *See id.*, p. 53. Plaintiffs did not file a timely notice of appeal to the Fifth Circuit from Judge Lynn's dismissal with prejudice of their civil RICO claims. Consequently, Judge Lynn's ruling is final and unappealable. As a result, the RICO claims against the Defendants named in the Northern District of Texas case are barred by Judge Lynn's

clear ruling dismissing them with prejudice,[5] and they cannot provide a basis for application of RICO's special venue provision.

B. New Defendants in This Case

All other Defendants have been named for the first time in this lawsuit. Civil RICO claims are governed by a four-year statute of limitations. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987); *Martinez Tapia v. Chase Manhattan Bank,* 149 F.3d 404, 411 (5th Cir. 1998); *Boulmay v. Rampart 920, Inc.,* 124 F. App'x 889, 891 (5th Cir. 2005). The statute begins to run when the plaintiff "knew of [or] should have known of his injury" and not when the plaintiff discovers both a RICO injury and the pattern of racketeering activity. *See Boulmay,* 124 F. App'x at 891 (citing *Rotella v. Wood,* 528 U.S. 549, 553-54 (2000)).

Plaintiffs filed this lawsuit on February 2, 2007. It is clear from Plaintiffs' Amended Complaint and from the full record in this case that the civil RICO

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[5] Many of the Defendants in this case seek sanctions against Plaintiffs, citing Judge Lynn's admonition that Plaintiffs would be in violation of her dismissal order if they "were to essentially reassert what you have asserted here. . . ." *See* Transcript, Exh. 4 to Doc. # 14, p. 54. Because it is Judge Lynn's order that has been violated by Plaintiffs' refiling of their RICO claims against the same entities that were Defendants in her case, the request for sanctions should be presented to Judge Lynn.

claims accrued many years before February 2, 2003, the beginning of the four-year limitations period applicable to the RICO claims. Plaintiffs allege that they suffered injury to their professional reputations through association with Defendants' fraudulent insurance and clinical research practices, and that Davidson would not have accepted and continued his employment with Vivra but for the fraudulent representations made to Davidson. *See* Amended Complaint, ¶ 14. Davidson's employment with Vivra ended in 1999, and Plaintiffs admit that they realized "they had sustained RICO injury ... on or about February 20, 2001, by means of an FOI request." *See* Response [Doc. # 16], pp. 7-8.

Plaintiffs did not, however, assert RICO claims against Defendants Kent Thiry, Joseph Mello, Michael Meehan, Bruce Heurlin, DVA, Davita, Sepracor, or Tartaglia until February 2, 2007, well beyond the four-year statute of limitations. As a result, Plaintiffs' RICO claims against these Defendants are time-barred and cannot support venue under the special RICO venue provision.

IV. CONCLUSION AND ORDER

Venue is not proper under the general venue statute, 28 U.S.C. § 1391. Plaintiffs' RICO claims against the Defendants who were named in the Northern District of Texas case were dismissed with prejudice by Judge Lynn. Her ruling is now final and nonappealable, and Plaintiffs cannot revive the

dismissed claims by filing them here. Plaintiffs' RICO claims against the Defendants who were not named in the Northern District of Texas case are time-barred. As a result, Plaintiffs do not have a civil RICO claim in this case, and they cannot rely on RICO's special venue provision, 18 U.S.C. § 1965. Accordingly it is hereby

ORDERED that Defendants' Motions to Dismiss [Docs. # 9, # 37, # 39, # 41, and # 42] are **GRANTED**. The Court will issue a separate Final Order.

SIGNED at Houston, Texas, this 5th day of **July, 2007**.

/s/ Nancy F. Atlas
Nancy F. Atlas
United States District Judge

APPENDIX O

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ROBERT M. DAVIDSON, *et al.*, Plaintiffs,	§	CIVIL ACTION NO. H-07-0471
v.	§	
JAY GROSSMAN, *et al.*, Defendants.	§	

ORDER

(Filed May 10, 2007)

Several defendants filed motions to dismiss Plaintiffs' original complaint, after which Plaintiffs filed an Amended Complaint [Doc. # 19]. It is hereby

ORDERED that the Motions to Dismiss [Docs. # 18 and # 20] are **DEEMED MOOT**, as the moving Defendants have now filed motions to dismiss the amended complaint. It is further

ORDERED that Defendants Albany Medical College and Anthony P. Tartaglia's Motion to Consider the Motion to Dismiss the Complaint as Addressed to the Amended Complaint [Doc. # 34] is **GRANTED**. It is further

ORDERED that Plaintiffs may not file another amended complaint without leave of court. It is further

ORDERED that Plaintiffs' Motion for Judicial Notice [Doc. # 40] is **GRANTED** only to the extend that the Court can take judicial notice of the ***existence of*** Plaintiffs' Petition for Writ of Mandamus, denied by the United States Supreme Court in November 2006, and **DENIED** in all other respects. It is further

ORDERED that Plaintiffs shall file by May 25, 2007, a consolidated response addressing each issue raised in Defendants' Motions to Dismiss [Docs. # 9, # 37, # 39, # 41, and # 42]. *Plaintiffs are cautioned that failure to respond as ordered by May 25, 2007 may, if appropriate, result in dismissal of this lawsuit.* Defendants may file a reply by June 1, 2007. It is further

ORDERED that by **June 1, 2007**, Plaintiffs shall either present evidence of service on Defendant Joanne Wray or show cause why this case should not be dismissed for lack of service. *Plaintiffs are advised that failure to comply will result in dismissal of this case as to Defendant Wray pursuant to Rule 4(m) of the Federal Rules of Civil Procedure.*

SIGNED at Houston, Texas, this **10th** day of **May, 2007**.

/s/ Nancy F. Atlas
Nancy F. Atlas
United States District Judge

APPENDIX P

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

ROBERT M. DAVIDSON (PRO SE) VANESSA E. KOMAR (PRO SE) Plaintiffs,	§	
v.	§	
JAY GROSSMAN; EUDICE GROSSMAN; GAYLE F. PETRILLO; CHARLES W. OTT; JOANNE C. WRAY; ALBANY MEDICAL COLLEGE; VIVRA HOLDINGS INC.; GAMBRO HEALTHCARE, INC. Defendants.	§	Civil Action No. 3:06-CV-920-M

ORDER

(Feb. 2, 2007)

Before the Court is Plaintiffs' Motion to Alter or Amend Judgment Under FRCP 59(e). For the reasons set forth below, the Court **DENIES** Plaintiff's Motion.

This Court dismissed Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(3), finding that Plaintiffs failed to establish proper venue under either the general venue statute, 28 U.S.C. § 1391(b),

or under the particular venue provision in the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1965(a). Within ten days after entry of judgment, Plaintiffs filed their Motion to Alter or Amend Judgment.

A "motion to alter or amend the judgment under Rule 59(e) must clearly establish either a manifest error of law or fact or must present newly discovered evidence and cannot be used to raise arguments which could, and should, have been made before the judgment issued." *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863 (5th Cir. 2003) (quotations omitted).

Plaintiffs fail to assert either of these two reasons as a basis for the Court's granting of their Motion. Though the Plaintiffs attached evidence to their Motion, Plaintiffs made no showing that this evidence was newly discovered or should otherwise be considered after judgment in this case. In order to prevail on a Rule 59(e) motion, the Plaintiffs must show that they were unable to uncover the evidence prior to the Court's judgment. *Miller v. Baker Implement Co.*, 439 F.3d 407, 414 (8th Cir. 2006). Evidence is not "newly discovered" if it was "plainly available or easily discovered" before judgment. *ICEE Distribs., Inc. v. J&J Snack Foods Corp.*, 445 F.3d 841, 848 (5th Cir. 2006). *See also Atl. States Legal Found., Inc. v. Karg Bros., Inc.*, 841 F. Supp. 51, 56 (N.D.N.Y. 1993) ("Newly discovery evidence is that which is truly newly discovered or could not have been found by due diligence.") (internal quotation omitted). Therefore, the Court strikes Plaintiffs' evidence as untimely

filed. *See Templet v. HydroChem Inc.*, 367 F.3d 473, 478 (5th Cir. 2004) (noting the factors for the court to consider include "1) the reasons for the moving party's default; 2) the importance of the omitted evidence to the moving party's case; 3) whether the evidence was available to the non-movant before she responded to the summary judgment motion; and 4) the likelihood that the nonmoving party will suffer unfair prejudice if the case is reopened"). Plaintiffs' Motion is **DENIED.**

SO ORDERED.

DATED: ~~January~~ February 2, 2007.

/s/ Barbara M.G. Lynn
BARBARA M. G. LYNN
UNITED STATES
DISTRICT JUDGE
NORTHERN DISTRICT
OF TEXAS

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

ROBERT M. DAVIDSON (PRO SE) VANESSA E. KOMAR (PRO SE) Plaintiffs,	§	
v.	§	
JAY GROSSMAN; EUDICE GROSSMAN; GAYLE F. PETRILLO; CHARLES W. OTT; JOANNE C. WRAY; ALBANY MEDICAL COLLEGE; VIVRA HOLDINGS INC.; GAMBRO HEALTHCARE, INC. Defendants.	§	Civil Action No. 3:06-CV-920-M

ORDER OF DISMISSAL

(Jan. 5, 2007)

Before the Court are Motions to Dismiss filed by Defendants in this case. Having considered all briefing in this case and after hearing oral argument on the Motions, the Court **GRANTS** the Motions of the Defendants to Dismiss for Improper Venue pursuant to Federal Rule of Civil Procedure 12(b)(3).

The Court finds that the Plaintiffs have failed to establish proper venue under either the general venue state, 28 U.S.C. § 1391(b), or under the particular

venue provision in the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1965(a). The Court finds that the Plaintiffs have failed to establish in their pleadings that a substantial part of the events or omissions giving rise to their claims occurred in this district. The Court finds that the Plaintiffs have failed to show in their pleadings that any of the Defendants reside, are found, have an agent, or transact their affairs in this district, as required to establish venue under the RICO statute. Dismissal of this action is therefore appropriate pursuant to Federal Rule of Civil Procedure 12(b)(3).

It is hereby **ORDERED, ADJUDGED, AND DECREED** that this case is **DISMISSED** in its entirety without prejudice to re-filing in a proper venue. All costs are taxed to the party incurring the same. All findings made by the Court on the record in the hearing held on January 4, 2007, are incorporated by reference.

SO ORDERED.

DATED: January 5, 2007.

/s/ Barbara M.G. Lynn
BARBARA M. G. LYNN
UNITED STATES
DISTRICT JUDGE
NORTHERN DISTRICT
OF TEXAS

APPENDIX R

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT M. DAVIDSON, ET AL., Appellants, v. JAY GROSSMAN, ET AL., Appellees.	No. 07-20650

APPELLEE SEPRACOR INC.'S OPPOSITION TO APPELLANTS' SECOND MOTION FOR DECLARATORY JUDGMENT

Appellee Sepracor Inc. ("Sepracor"), by and through its undersigned counsel, opposes Appellants' Second Motion for Declaratory Judgment ("Motion") pursuant to 28. U.S.C. § 2201(a) for a declaration that the Prescription Drug User Fee Act ("PDUFA") is unconstitutional.

Sepracor submits that the Motion is not properly before the Court and is wholly without merit. Neither Sepracor nor any of the other Appellees is responsible for administering or enforcing the PDUFA, which is solely enforced by the Food and Drug Administration. Nor have Plaintiffs presented any allegations which could reasonably be construed to establish a cognizable injury sufficient to provide Article III standing. In light of the procedural irregularities of Appellant's Motion, Sepracor will not at this time prepare and file

further briefing in response to the Motion. However, should the Court believe a further response would be helpful, Sepracor respectfully requests that the Court enter an order calling for a response and setting a briefing scheduling. Sepracor promptly will file a brief in opposition in accordance with the Court's order.

Dated: November 20, 2007

Respectfully submitted,

/s/ Sandra F. Palmer
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Washington DC Bar
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ATTORNEYS FOR SEPRACOR INC.

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(2)

No. 07-1525

Supreme Court, U.S.
FILED
SEP 5 - 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ROBERT M. DAVIDSON and
VANESSA E. KOMAR,

Petitioners,

v.

JAY GROSSMAN; EUDICE GROSSMAN; GAYLE F. PETRILLO; CHARLES OTT; JOANNE C. WRAY; KENT J. THIRY; JOSEPH C. MELLO; MICHAEL J. MEEHAN; BRUCE R. HEURLIN; ANTHONY P. TARTAGLIA; DVA RENAL HEALTHCARE INC; ALBANY MEDICAL COLLEGE; VIVRA HOLDINGS INC; GAMBRO HEALTHCARE INC; DAVITA INC; SEPRACOR INC,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF AND APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ROBERT M. DAVIDSON
VANESSA E. KOMAR
Petitioners Pro Se
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Pursuant to Supreme Court Rule 15.8, Petitioners pro se (Robert Davidson and Vanessa Komar, referred to collectively as the "Davidsons") submit for filing this Supplemental Brief in Support of Petition for Writ of Certiorari (07-1525, filed on June 4, 2008), calling attention to new cases not available at the time of the party's last filing, specifically the recent holdings of this Court in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. ___ (2008) (decided June 9, 2008), and the Eleventh Circuit in *Liquidation Commission v. Luis Alvarez Renta* (11th Cir. 2008) (decided June 19, 2008).

ARGUMENT

This lawsuit is not stale. The "*separate accrual*" rule adopted by the Fifth Circuit should have been applied by the District Court (SDTX) to restart the limitations period, based on the Eleventh Circuit holdings in *Liquidation Commission* ("*RICO need not necessarily be the claim of last resort, but neither can a plaintiff seek to treble damages that he did not actually incur.*") Vanessa Komar and Robert Davidson are proper RICO plaintiffs, based on this Court's holdings in *Bridge* ("*A plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations.*") Davidsons' RICO claim is predicated on mail fraud (research, insurance, and employment fraud). The statute of

limitations should restart because Davidsons have show[n] "*new and accumulating injury [to] the plaintiff[s].*" Davidsons have alleged new overt acts within the limitations period.

Congress did not intend for proper RICO plaintiffs to seek to treble damages that they did not actually incur. 18 U.S.C. §1964(c). The Final Order (Appendix M) of the District Court, which was affirmed by the Fifth Circuit (Appendix A) under Fifth Circuit Rule 47.6 (Supp. App. 42), overlooks the cardinal principle that *a limitations period does not begin to run until the cause of action is complete.* This lawsuit was filed on February 2, 2007. Davidsons' injury was not *complete* on February 2, 2003 (the beginning of the 4-year limitations period). Standing is not a problem in this lawsuit because Davidsons have suffered '*real injury*' in Gregg County, TX and Pima County, AZ and because '*that injury can be redressed by damages.*' Davidsons have sufficiently alleged proximate cause under *Holmes v. Securities Investor Protection Corporation,* 503 U.S. 258 (1992), and *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), because they were "*immediately injured*" by Respondents' schemes (Supp. App. 1 thru 41). Davidsons' injuries are no longer speculative. All available legal remedies have been exhausted. Davidsons' RICO claims are "*ripe enough to be tried, under any standard.*" Davidsons (*both* Vanessa Komar and Robert Davidson) are proper RICO plaintiffs under *Bridge* and *Anza*. Davidsons properly preserved the issue ("*separate accrual*") at trial *and on appeal*. This

Court should review the accrual rule applied by the District Court (SDTX) and measure it against the purpose of Congress in establishing civil RICO under the de novo standard of review. Davidsons' lawsuit is distinguished from *Rotella v. Wood*, 528 U.S. 549, 553-54 (2000) by, inter alia, the fact that Davidsons dispute that constructive knowledge ("storm warnings") of injury in February 20, 2001, completed the elements of their cause of action. Hence, this Court needs to decide what limitations accrual rule might apply in such a case. The holdings of this Court in *Bridge*, and the Eleventh Circuit in *Liquidation Commission*, may be retroactively applied to vacate the *Final Order* (July 5, 2007) under the doctrine of *stare decisis*. This lawsuit is now imminently justiciable.

Davidsons have established a nexus between their injury and Grossman's RICO violations. Grossman violated 18 U.S.C. §1962(b) when he acquired an interest in the Vivra enterprise on or about April 22, 1997. Grossman *and others* violated 18 U.S.C. §1962(c) and 18 U.S.C. §1962(d), when on May 11, 1999, he assaulted Davidson at the Vivra Tucson, AZ facility. The overt acts and omissions by Grossman *and others* which Davidson alleges to have taken place on May 11, 1999, in the Amended Complaint, represent multiple overt acts of racketeering. Grossman admitted to the acquisition of Vivra stock at Supp. App. 10, where on direct examination of Jay Grossman by Bruce Heurlin (appearing for the state):

Q: And is it correct that you were paid in Vivra stock.
A: Yes, I was.

In his concurrence in *State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987), then-Judge Kennedy first applied the "*separate accrual rule*" in the RICO context: The rule is that a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and other acts were committed outside the limitations period. Davidsons alleged new overt acts within the limitations period. *Pace Industries, Inc. v. Three Phoenix Co.*, 813 F.2d 234 (9th Cir. 1987). Davidsons' injury has occurred and is known, and it is not speculative whether the damages might be reduced or even eliminated by alternative recovery efforts, because Davidsons' damages are actual damages and all available legal remedies have been exhausted.

Extrinsic fraud in a Chapter 11 Bankruptcy proceeding (In Re: Magellan Health Services, Inc.) was alleged. The first RICO action (filed on February 19, 2003, in Tucson, AZ) was stayed by the automatic stay on June 17, 2003. See page 6 of Document 56 under the heading *Statute of Limitations*. See pages 8 thru 22 of Document 47 filed in SDTX. See pages 1 thru 2 of Document 48-2 filed in SDTX. See pages 10 thru 13 of Document 79. See the exhibits at TAB A of Document 79. *The Affidavit of Michael P. McQuillen, signed on October 29, 2003*, found at pages 10 thru 14 of Document 47, was under oath, false, material to Davidsons' claims, material to obtaining Chapter 11 Discharge Confirmation and permanent injunction,

made with knowledge of its falsity, and ***represents new overt acts within the limitations period***.

Grossman's use of "$2.9 million worth of stock" in Vivra (Supp. App. 10 thru 13, and 22) as a measure of alleged damages against Davidsons on November 23, 2004 (Tucson Damages Hearing), ***represents new overt acts within the limitations period***. *The Declaration of Michael J. Meehan, Document 41 filed in SDTX on May 7, 2007), before a federal judge,* ***represents new overt acts within the limitations period***. Meehan's Declaration of Michael J. Meehan was under oath, false, material to jurisdictional facts, and made with knowledge of its falsity.

Davidsons' Amended Complaint and the full record in this case pass the proximate cause test described in *Anza*. The asserted causal chain is direct, not attenuated, and there are no other factors which could have led to Davidsons' injury. See Supp. App. 1 thru 41. The proceedings required to evaluate Davidsons' injury are *now* very straight-forward, given the actual damages sustained in Gregg County, TX and in Pima County, AZ. The proceedings would not entail an "*intricate, uncertain*" inquiry of the type that this Court warned against in *Anza*. There are no more immediate victims of the Defendants' alleged RICO violations who are likely to sue.

Under *Bridge* and *Liquidation Commission*, Vanessa Komar's standing under Count One is *identical* to that of her husband's (Robert Davidson's)

standing under Count One. No complex (metaphysical) apportionment of damages to avoid duplicative recoveries is necessary here. Plaintiffs' RICO claims survive dismissal under the "*separate accrual*" doctrine. In this lawsuit, the District Judge failed to follow the rule of separate accrual. The separate accrual doctrine was adopted by the Fifth Circuit in *Love v. National Medical Enterprises,* 230 F.3d 765 (5th Cir. 2000). "*New and independent*" *actual* damages within the limitations period are *readily apparent* on the face of the Amended Complaint.

The Amended Complaint and the full record in this case *clearly* indicates that Davidsons' cause of action was not complete at the time of their constructive knowledge of injury ("*storm warnings*") in February 20, 2001, by means of an FOI request. See App. 39 (of Petition). A new accrual rule should apply where a Plaintiff's injury does not complete their cause of action. Davidsons pray for this Court to grant certiorari and, inter alia, clarify when a civil RICO cause of action accrues. Congress intended this issue to be framed as one of *ripeness* from the actual language of the RICO statute. The District Court's faulty application of governing legal authorities to the facts in this case represents manifest legal error.

Davidsons pray for a civil RICO accrual rule from this Court, where the limitations period is triggered by actual damages under "separate accrual" doctrine. The term "*injury*" should be strictly linked to actual damages. The present ambiguous state of affairs with respect to civil RICO accrual gives a

distinctly different meaning to "*injury*" depending on whether the beholder of the word is a RICO plaintiff or defendant. This word should be given the meaning that Congress intended when the RICO statute was enacted.

Pursuant to Federal Rules of Evidence 201(b)(2) and (f), this Court may judicially-notice the certified transcript of the Hearing on Damages ("Tucson Damages Hearing") of November 23, 2004, before the Honorable Jane L. Eikleberry, Judge in Pima County Superior Court Case C-333954, provided in the Supplemental Appendix to this Brief. Rule 201(f) allows a court to take judicial notice at any stage of a proceeding, including on appeal. *Colonial Leasing v. Logistics Control Group Intern.*, 762 F.2d 454, 459 (5th Cir. 1985). Davidsons hereby request that this Court sua sponte take judicial notice of the Tucson Damages Hearing and supplies this Court the necessary information at Supp. App. 1 thru 33.

Prior to the Tucson Damages Hearing on November 23, 2004, the possibility of damages was "'*speculative [and] their amount and nature unprovable.*'" *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). Davidsons' RICO claims were not ripe for suit prior to the Tucson Damages Hearing of November 23, 2004. The "loss" (actual damages) suffered on Defendants' RICO violations, could not be determined until November 23, 2004.

Davidson's Amended Complaint asserted a nexus between the RICO violations and injury. Proof of the

nexus is found in the Minute Entry Order of November 24, 2004 (at pages 17 thru 19 of Document 57-11 filed in SDTX), the Amended Judgment (Nunc Pro Tunc), file-stamped on January 4, 2005 (at circled exhibit #34 thru #36 of Document 98 filed in SDTX) in the Arizona State Action, and the Affidavit Pursuant to Uniform Enforcement of Foreign Judgments Act, signed by Daniel J. Artz on January 13, 2005 (at circled exhibit #37 thru #40 of Document 98 filed in SDTX).

Davidsons properly preserved the issue of "*separate accrual*" of new and independent injuries on appeal. See Point of Error Two captioned "The Statute of Limitations is Tolled for this Lawsuit" of Davidsons' Opening Brief to Fifth Circuit (07-20650). See pages 19-26 of Davidsons' Reply Brief under the heading *Standing*. Davidsons raised the issue of "*separate accrual*" at page 3 of Document 71 filed in SDTX, and provided evidence of "*new and independent*" injuries in Documents 57, 71, 79, 83, 95, and 98, filed in SDTX.

Davidsons provided the District Court (Houston) with evidence that Davidsons sustained actual damages in the forum state of Texas. This Court is referred to ¶s 14 and 87 of the Amended Complaint. The affidavit and exhibits at circled page #34 thru #40 of Document 98 filed in SDTX are material to this issue. Pursuant to Federal Rules of Evidence 201(b)(2) and (f), Davidsons hereby request that this Court take judicial notice of the Notice of Constable Sale of July 24, 2006, filed in TXND on September 29, 2006,

and filed *again* in TXSD on September 18, 2007; the Notice of Constable Sale of June 5, 2007, filed in TXSD on September 18, 2007; the Texas Articles of Association of Dominion Health Services, P.A. file-stamped by the Texas Secretary of State on September 13, 1999; and the Texas Articles of Organization of Health Patrons PLLC file-stamped by the Texas Secretary of State on November 17, 1999, and supplies this Court the necessary information at Supp. App. 34 thru 41.

Davidsons' constructive knowledge (*"storm warnings"*) of injury on February 20, 2001, by means of an FOI request, did not complete their RICO cause of action under the *"separate accrual"* rule. See App. 39. *Poling v. K. Hovnanian Enters.*, 99 F. Supp. 2d 502, 511 (D.N.J. 2000) (cause of action does not accrue until all elements of RICO claim exist). The *fact* of new and independent actual damages did not occur until *after* November 23, 2004 (the date of the Tucson Damages Hearing). Predicate conspiracy acts occurred within the limitations period on November 23, 2004, when Grossman used $2.9 million in Vivra stock as a measure of damages against the Davidsons at the Tucson Damages Hearing. These new predicate conspiracy acts are new and independent acts, not merely a reaffirmation of previous acts. These new predicate conspiracy acts on November 23, 2004, have inflicted new and accumulating injury on the Davidsons. *Pace Industries Inc. v. Three Phoenix Co.*, and *State Farm Mut. Auto. Ins. Co. v. Ammann.*

The Schematic diagram found at pages 8 thru 10 of Document 16-6 is identical to the Schematic diagram which was submitted as part of Davidsons' *First Amended Complaint* in Tucson, AZ on April 30, 2003, in Case 4:03-cv-110-TUC-FRZ (*Davidson v. Vivra Inc*). From this schematic diagram, it is clear that just as in *Bingham v. Zolt*, 66 F.3d 553, 562 (2d Cir. 1995), there were a *variety of schemes* which were related only in their ultimate goal which resulted in "*new injuries.*" The underlying predicate acts of each scheme, however, were related and continuous. The district court in *Bingham v. Zolt* ruled that [the estate's] previous knowledge of the underlying wrongful acts did not bar its action as to these RICO injuries under the "*separate accrual*" rule. *In contrast*, the district court (SDTX) erred in dismissing Davidsons' lawsuit, where Davidsons' previous knowledge of the underlying wrongful acts did *not* bar its action as to these RICO injuries under the "*separate accrual*" rule. Davidsons had no cause of action under 18 U.S.C. §1962(b) *before* the Tucson Damages Hearing (November 23, 2004), since up until that time the possibility of damages was speculative.

Davidsons' newly-incurred damages (Supp. App. 38 thru 41) are sufficiently independent from their original injuries to start a new civil RICO limitations period running. *Bankers Trust Co. v. Rhoades,* 859 F.2d 1096 (1988).

The Final Order which dismissed this lawsuit represents manifest legal error, where at App. 38 of Appendix N, it states, "It is clear from Plaintiffs'

Amended Complaint and from the full record in this case that ***the civil RICO claims accrued many years before February 2, 2003***, the beginning of the four-year limitations period applicable to the RICO claims." The District Court erroneously looked to the date of constructive knowledge of injury (February 20, 2001) to trigger the limitations period, whereas the date of "*new and independent*" *actual* damages within the limitations period is the proper consideration under *Liquidation Commission* and the "*separate accrual*" doctrine. Under *Liquidation Commission* and the "*separate accrual*" rule, Davidsons' civil RICO cause of action was not complete at the time of constructive knowledge ("*storm warnings*") of their injury.

Davidsons' RICO claims against the "*new defendants in this case*" (Kent Thiry, Joseph Mello, Michael Meehan, Bruce Heurlin, DVA, Davita, Sepracor, and Tartaglia) are timely-filed within the four-year statute of limitations, because Davidsons have incurred "*new and independent*" *actual* damages within the limitations period in Gregg County, TX and in Pima County, AZ. New predicate conspiracy acts within the limitations period have also been identified (Grossman's use of $2.9 million in Vivra stock as a measure of damages against Davidsons at the Tucson Damages Hearing of November 23, 2004). The RICO claims as to the "*new defendants in this case*" are *not stale*, because new predicate conspiracy acts within the limitations period have restarted the statute of limitations.

"*Vivra*" used stock ownership and stock options to control Grossman, to give Grossman an interest in the enterprise, and to provide Vivra with a "*vehicle*" to use Grossman's stock ownership as a measure of damages *against Davidsons* should Grossman ultimately prevail in his Arizona State action (defamation) against Vanessa E. Komar and Robert M. Davidson. Vanessa Komar was never employed by Vivra and never worked as a nurse for Vivra. Vanessa Komar was named [solely by virtue of her community property interest with Robert Davidson] as a defendant in Grossman's Arizona defamation action. There were no allegations that Vanessa Komar ever defamed or caused intentional emotional distress to Jay Grossman and Eudice Grossman.

Davidsons alleged more than just *reputational* injury flowing from the alleged insurance, research, and employment fraud in the Amended Complaint. *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143 (5th Cir. 1997). Davidsons' actual damages in Pima County, AZ and Gregg County, TX were foreseeable, natural consequences of the defendants' insurance and research fraud, and the fraudulent hiring and retention of Davidson, and could certainly be anticipated as natural consequences of their alleged new predicate conspiracy acts within the limitations period.

Davidsons' injuries flow foreseeably and were natural consequence of Grossman's acquisition of $2.9 million in Vivra stock through a pattern of racketeering on or about April 22, 1997, Grossman's position

within the enterprise, the predicate conspiracy acts of May 11, 1999, at the Vivra Tucson facility, and the predicate conspiracy acts of November 23, 2004 (Tucson Damages Hearing), within the limitations period. The actual damage to Davidsons' business and property within the limitations period in Gregg County, TX and Pima County, AZ "*flowed*" from RICO predicate acts.

Respectfully submitted,

ROBERT M. DAVIDSON
VANESSA E. KOMAR

Petitioners Pro Se
P.O. Box 1785
Kilgore, TX 75663
903-235-0731

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

JAY GROSSMAN and
EUDICE GROSSMAN,

Plaintiffs,

vs. NO. C-333954

ROBERT MICHAEL DAVIDSON,
et al.,

Defendants.

ROBERT MICHAEL DAVIDSON
AND VANESSA KOMAR,

Counterclaimants,

vs.

JAY GROSSMAN and
EUDICE GROSSMAN,

Counterdefendants

Tucson, Arizona
11/23/04

BEFORE: The Honorable Jane L. Eikleberry, Judge

Appearances:

Bruce Heurlin, Esq.,
Appearing for the State

Dr. Michael [sic] Davidson, Pro Per,
Vanessa Komar, Pro Per

HEARING ON DAMAGES

GAIL D. VINSON, CCR, RPR
Arizona #50610
Official Court Reporter
Pima County Superior Court
Tucson, Arizona 85701

[2] THE COURT: This is Case No. 20033954 [sic], Grossman versus Davidson. Would you state your appearances for the record, please?

MR. HEURLIN: Bruce Heurlin on behalf of the plaintiffs. With me are Dr. Jay Grossman, his spouse Eudice Grossman and Tom Pachelli, who works at my office.

THE COURT: Thank you. The Davidsons do not appear to be here, nor have they contacted my office to appear telephonically. Have you had any contact with the Davidsons?

MR. HEURLIN: No. And I would like to note it's 1:30 p.m. I have not had any contact with Dr. Davidson, although I did not expect him to be here. I am thinking back. I don't think I have ever had a telephone conversation with Dr. Davidson. Although I have called him. I don't think he has ever returned a telephone call, I don't know if the Court has received this, but this morning I received a document, a pleading from Dr. Davidson called a Notice of Petition for Special Action to the Arizona Supreme Court.

THE COURT: I have not seen this.

MR. HEURLIN: It came Fed Ex to me, and the service shows it went to the clerk of the Pima County Superior Court, so it was not sent to you. Would you [3] like to see this?

THE COURT: Sure.

It reflects that it was mailed to you and to the Clerk of the Pima County Superior Court on November 22.

Mr. Heurlin, what's your opinion as to whether that document, assuming it was filed, whether that interferes with this Court's jurisdiction or takes away our jurisdiction?

MR. HEURLIN: I am fairly sure it does not divest this court of jurisdiction. It is the petition that can be accepted or not accepted during the pendency of the Superior Court's jurisdiction. And I would note that it does not ask for a stay of this proceeding, and it's not even directed to the Court of Appeals, its directed directly to the Arizona Supreme Court.

As you, I am sure, are aware of, Dr. Davidson also has pending a request to stay this proceeding before Justice O'Connor in the U.S. Supreme Court, which to my memory has not been ruled on as of right now.

I conclude that this has no effect on the Court's ability to proceed today.

THE COURT: All right, fine. Let's proceed.

MR. HEURLIN: I would like – did you receive the statement of damages that I filed?

[4] THE COURT: It was faxed to my office right before lunch, and I have just had a chance to glance at it.

MR. HEURLIN: And I filed that this morning – or this afternoon at the clerk's office. So what I would like to do is proceed. And the statement of damages essentially outlines what I intend on doing today on this hearing.

Just to make a statement regarding this hearing, as the Court knows, the Court entered a default against Dr. Davidson and spouse as to answering and responding to the First Amended Complaint dismissing the counterclaim. And we are here today for a hearing pursuant to Rule 55-B-2 of the Arizona Rules of Civil Procedure to establish damages.

The context that we have is that because there's a default on the First Amended Complaint and considering the allegations of the First Amended complaint that are very specific, we don't have to concern ourselves with the allegations as to the wrongdoing committed by Dr. Davidson on behalf of this community or the proximate cause of those statements, because in the First Amended Complaint it specifically states and alleges that Dr. Davidson committed certain wrongdoings and those wrongdoings caused certain [5] results. And so all that is admitted.

So we are here only to ask to present evidence through the testimony of Dr. Grossman and some exhibits to the Court and ask the Court to find damages to be entered as a judgment against Dr. Davidson.

And with that, I would like to call Dr. Grossman as a witness.

JAY GROSSMAN

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HEURLIN:

Q Would you please state your name?

A My name is Jay Grossman, G-R-O-S-S-M-A-N.

Q And, as we go along, would you, please speak up so that the court reporter and the judge can hear you well?

A I have a cold. I will do my best.

THE COURT: Is the microphone on?

THE WITNESS: It is now.

Q (By Mr. Heurlin) Dr. Grossman, would you briefly state what your educational background is?

A I graduated medical school in Syracuse, New York, in 1967. I did a medical residency in New York

City at Downstate Medical Center. I did a National Institute of [6] Health fellowship in allergy and immunology at the University of Rochester, finishing in 1972.

I then became a major in the U.S. Army Medical Corps in El Paso, Texas, directing the Asthma and Allergy Division at the Army Medical Center and the regional area

Q And at some point, did you practice medicine in Albany?

A I was in practice in Albany, New York, from 1974 to the end of 1992 when I moved to Tucson, Arizona.

Q And you were licensed in New York, correct?

A That's correct.

Q And you are currently licensed in Arizona?

A Correct.

Q Tell me about your involvement in the American College of Allergy?

A I have been a member of the American College of Allergy since the early to mid-1970s. I have been a director of their first course that they put on to train people in clinical research, and I did this for three years and was an electorate besides being the director of this course.

Q What is clinical research?

A Clinical research is a study using patients to look at the efficacy and potential side effects of drugs that [7] are coming to market or drugs that are already on the market looking for a new indication.

Q And are these research projects sponsored by a company?

A They are usually sponsored by a pharmaceutical company.

Q And in the United States, approximately how many physicians are involved in clinical research, in particular regarding allergy?

A There are probably 25 or 30 physicians who do clinical research in allergy and asthma on a regular basis.

Q And that's throughout the United States?

A Throughout the United States, correct.

Q Does the FDA, the Federal Drug Administration, monitor the clinical research?

A They monitor clinical research very closely. And every project that we get involved with gets submitted to the FDA for approval and review.

Q And when you use the term, "we," what do you mean by that?

A "We" meaning the company that I founded to do clinical research here in Tucson, as well as other clinical investigators around the country. So the FDA

is very closely monitoring the research studies. And [8] you need approval before starting the study, and then you get reviewed at the end.

Q Now, at some point, you previously stated that you moved from Albany, New York, to Tucson. Was that in connection of your becoming involved with a company called Vivra?

A No, I came here on my own and didn't get involved with Vivra until, I believe it was, 1997.

Q So you practiced in Tucson from 1992 until 1997, correct, private practice?

A 1993 to '97, correct.

Q And that was an allergy practice?

A Yes.

Q Did that involve clinical research?

A Yes, it did. Clinical research was a very important part of my practice. In fact, probably 80 to 90 percent of my practice was conducting clinical research during those years.

Q And, as far as being an important part of your practice, was it a profitable part of your practice?

A Most of my income came from directing the clinical research studies.

Q Did you have a reputation throughout the United States regarding clinical research?

Yes, I did. I was a consultant to several [9] pharmaceutical companies, lectured for several pharmaceutical companies in the United States and overseas.

Q At a point in time, did you essentially merge or sell your practice that you had in Tucson to Vivra?

A In 1997, Vivra – I can't remember their full name, but Vivra bought my practice from me and hired me as a consultant to conduct the clinical research.

Q I would like to have you look at what I would like to mark as Exhibit 1.

MR. HEURLIN: Your Honor, would you like to have a copy of this, as well?

THE COURT: That would be helpful. Thank you.

Q (By Mr. Heurlin) What is Exhibit 1?

A Exhibit 1 is a copy of my sale agreement to Vivra for my practice.

Q I would like to have you look at page 2, Paragraph 2.1. In this paragraph it states that Vivra is going to buy your practice essentially for $2,900,000; is that correct?

A That's correct.

Q How was that value established?

A Well, they knew the amount of business that we did and looked at the future business that they

planned on having us conduct. And I make assumptions that this was [10] done at fair market value for the approximately $2 million a year of clinical research we did in our office.

Q And is it correct that you were paid in Vivra stock?

A Yes, I was.

Q And, after entering into this agreement, did you practice in Tucson as Vivra?

A Yes, I did.

Q And where was your office?

A Our initial office was on Campbell Avenue, and then we moved to the corner of Wetmore and First Avenue.

Q Just jumping ahead a little bit, how long were you in practice as Vivra in Tucson?

A Approximately two years, from 1997 – I believe it was in April until May of 19989 [sic].

Q I am going to show you what is marked as Exhibit 2. What is Exhibit 2?

A It is a copy of my physician employment agreement with Vivra.

Q And I would like to have you look at page 2, Paragraph 2.1. Is it correct that your employment agreement was for ten years?

A Correct.

Q And I would like to have you look at page 13, [11] Paragraph 10.1. Did you understand you had a restrictive covenant, a noncompete provision that required you not to compete with Vivra for a period of two years after ending your employment with Vivra?

A Yes, I did.

Q And as to Exhibit 1 and Exhibit 2, you signed these –

A Yes.

Q – as part of your relationship with Vivra?

A Correct.

Q At a point in time, Dr. Davidson somehow got involved in the Vivra enterprise; is that correct?

A That's correct.

Q When was that, approximately?

A September of 1996 [sic].

Q And what was his role?

A He was to be my assistant to help me conduct the clinical research at our office.

Q Now, you are familiar with the First Amended Complaint; is that correct?

A Yes, I am.

Q Those allegations in there have been deemed admitted, so I am not going to go into those. But at some point were you terminated by Vivra?

A Yes, I was.

[12] Q And when was that?

A I think the official termination came in July of 1999.

Q After your termination from Vivra, at a point in time did you open your own practice?

A Yes, I did.

Q And do you still have that practice ongoing today?

A Yes, I do.

Q And after you opened your practice in Tucson, did Vivra sue you to close you down under the non-compete clause?

A Yes, they did.

Q And you defended that lawsuit and prevailed in the lawsuit?

A Yes, I did.

Q And do you recall Judge Harrington denying the motion for a temporary restraining order in Pima County Superior Court?

A Yes, I do.

Q Now, I would like to show you Exhibit 3. Handing you Exhibit 3.

At a point in time, did you enter into a settlement agreement and mutual release between you and various Vivra-related companies?

A Yes, I did.

[13] Q And is Exhibit 3 that settlement agreement?

A Yes, it is.

Q I would like to have you look at page 3 at the top, which is the ending portion of Paragraph 7 on the preceding page. Do you see that?

A Yes, I do.

Q The $2,900,000 of stock that you received when Vivra purchased your practice, Vivra then paid you a total of $480,000 for that stock, correct?

A Correct.

Q So the difference would be $2,900,000 less $480,000, correct?

A Correct.

Q Now, this document, Exhibit 3, is dated about four years ago in the year 2000. November 15, as I recall is when you signed it.

A Yes. November 15, 2000.

Q Did that then end all your relationship with Vivra? You stated you had been terminated by Vivra earlier. But, after your termination, you still owned the stock?

A Correct.

Q And with this settlement agreement, did that totally terminate your relationship with Vivra?

A Yes, it did.

Q And how far along in the period of ten years of [14] your contract did you go before November 15, 2000?

A We went on for three – about three years of the ten-year contract.

Q And could you just tell me briefly, besides associating – essentially selling your practice to Vivra for $2.9 million and doing clinical research for Vivra, what were the other plans that you had when you entered into the relationship with Vivra regarding your practice?

A I was to develop other research sites in the large cities in the Southwest, including Phoenix, Albuquerque, El Paso as the main centers for it.

Q And did that occur?

A No, it did not.

Q How many offices do you have in Tucson today?

A Three.

Q Do you do any clinical research?

A No, I do not.

Q Why not?

A I have essentially been blackballed from doing clinical research.

Q What do you mean by that?

A Because of being fired by Vivra during the conduct of clinical studies and an ongoing FDA investigation at that point, I was in a way tainted by the being fired by [15] Vivra, even though the findings of the FDA were fine, there was nothing extremely negative about the findings by the FDA. I could have continued to conduct research if I had not been fired by Vivra during this period of time.

Q Okay, let me ask you a couple of follow-up questions. First, have you ever been sanctioned by the FDA?

A No, I have not.

Q Is there any kind of legal restriction on you in doing clinical research?

A No, there is not.

Q You said you were "tainted." I am not sure if you said that word. But how did this affect your reputation?

A It basically destroyed it. Once you are accused of any kind of activity that the FDA gets involved with, particularly being fired by the company that you work for, it basically negates any future ability to do any clinical research.

Q When you were terminated by Vivra, at that point in time were there a number of ongoing clinical research projects that you were involved in?

A Several.

Q And what happened to those research projects after [16] you were terminated by Vivra?

A Some were cancelled by the pharmaceutical companies. I don't believe very many were continued. I think basically most of them were cancelled. At that point, some Vivra may have continued to do. I am not sure about that.

Q When you were doing clinical research, were you doing clinical research in with sponsors who were major pharmaceutical companies?

A These were the largest pharmaceutical companies in the U.S. and sometimes abroad that conduct studies in allergy and respiratory disease and asthma. These are companies I had worked with for many years.

Q Give me some names.

A Well, the one that's in the news now, America Pharmaceuticals, Glassco Pharmaceuticals, Sheering

Blow, Eventis Pharmaceuticals, Forrester Laboratories, UCD Pharmaceuticals, several companies.

Q And do you attribute your termination – let me break that up. Do you attribute Dr. Davidson's accusations to your termination?

A Completely.

Q And do you attribute your termination to your inability today to do clinical research?

A Correct.

[17] Q And do you attribute your termination to constitute a damage to your reputation that you had earned prior to your termination?

A My reputation that I had earned doing research for probably 10, 12 years before that.

Q I am going to show you Exhibit No. 4. Are you looking – are you familiar with Exhibit No. 4?

A Yes, I am.

Q Painfully so?

A These are the billings for my legal fees involved with my suit

Q Okay. These are the bills from my firm to you regarding what led after your termination to the dispute with Vivra?

A Correct.

Q And these go all the way through, starting with your termination until the time the Vivra case was settled, as we saw in Exhibit 3, correct?

A Correct.

Q And those are the fees that my firm billed you and you paid; is that right?

A Correct.

Q I would like to show you Exhibit 5. Are you familiar with Exhibit 5?

A Yes, I am.

[18] Q And what is Exhibit 5?

A This is the billing from your firm for my case against Robert and Vanessa Davidson.

Q And these bills involve both the Complaint by you and the defense of the counterclaim by Dr. Davidson, correct?

A Correct.

Q And you paid this bill?

A Yes, I did.

Q Now, I would like to show you Exhibit 6. Exhibit 6 is a document from the Social Security agency or department, correct?

A Correct.

Q And on the second page it shows your earnings during a number of years, at least your Social Security earnings, correct?

A Correct.

Q Now, I would like to show you a number of exhibits.

I would like to have you – first of all, the exhibits you have in front of you, are those all W-2, IRS statements issued to you that state your income for a period of years?

A Yes, it is – yes, they are.

Q And what I would like to do is go through these one at a time. And the exhibit stickers, I think, are on [19] the back. I would like you to refer to the earliest year by the exhibit number. If you turn those upside down, they will be in order.

So the first one, what exhibit number is that?

A 17.

Q What year is it?

A 2003.

Q Well, flip them over, and let's go the other way.

A Okay.

Q The first one on the back is –

A 7.

Q Okay. What year is that?

A That is 1994.

Q And what's your gross income for that year?

A $940,000.

Q And this is after you moved from New York to Tucson, correct?

A A year before that, correct.

Q You were in Tucson at this point?

A Yes, I am in Tucson. I am sorry, 8. I moved.

Q Exhibit 8, what year and how many?

A That was 1995. And this is only part of my earnings that year. This is for consultative work. And this was – I am sorry. This is not mine.

Q Exhibit 8 is your spouses?

[20] A Exhibit 8 is my spouse's.

Q Okay, we will just –

A Exhibit –

Q 9?

A – 9, my earnings, that's $1,210,000.

Q Is that for 1995?

A 1996.

Q What happened with 1995?

A I am looking to see if we have it out of order here, I don't have it. I have it listed with my papers, but, no, I don't have it here. I have just one for Eudice Grossman for that year, for 1995.

THE COURT: Counsel, we have these figures on the Social Security statement. Why do we need to go through the W-2s?

MR. HEURLIN: This just supports this. The figures, as you state, are on here. We don't have to do this. Those just support those figures.

THE COURT: All right. Thank you.

Q How about this, Doctor; why don't you look at the Social Security statement, and let me ask you this: Have you compared your W-2 statements, which are the exhibits, I think 7 through 17, to the numbers on the Social Security statement to verify the Social Security statement is accurate?

[21] A Yes, I have.

Q Have you? Okay, then we don't need to do that.

MR. HEURLIN: Your Honor, I think that completes the testimony of Dr. Grossman.

THE COURT: Thank you. You may step down.

MR. HEURLIN: In the statement of damages that I filed, that is corroborated by the exhibits – I would just like to offer all the exhibits into evidence.

THE COURT: We will accept Exhibits 1 through 6, and Exhibits 1 through 6 will be admitted. But 7 through 17, since we didn't go over them, they will not be admitted.

MR. HEURLIN: Okay, in my Statement of Damages, all these numbers are discussed that are in Exhibits 1 through 6. And taking them one at a time, the sale of the medical practice, the stock purchase, the settlement, as I stated before during the – or as Dr. Grossman testified, essentially he sold his practice for 2.9 million, and in the settlement got $480,000 in return for the $2.9 million worth of stock. He paid $73,921 in costs and attorney fees regarding that litigation.

So his total loss is 2,493,921. That has to do just with Dr. Grossman entering into the relationship with Vivra and being terminated and settling that [22] dispute.

The salary that he lost, as Dr. Grossman testified, he made substantial income while doing clinical research. And that averaged $904,194 through, the year 1998. And, as he testified, he was fired in 1999. He then started earning income – he was fired in '99. He had income essentially up to that point of $278,590 in 1999.

In 2000, he essentially did not work until he, as we discussed, he settled his dispute after Vivra lost their temporary restraining order to enforce the noncompete clause.

And then, in 2001, he started building up his practice. And I would add that Dr. Grossman entered into private practice in violation of the noncompete clause to mitigate his damages, which he has done. And he has built his practice up, as you heard before. His average earnings in the three years after he was fired, 169,061. You compare that number to the $904,000 before he was fired. And so his average earnings decreased by that difference between 904,000 and 169 which is –

THE COURT: He wasn't always making that $900,000 figure. In '97, he made 734 and in '98 he made 767?

MR. HEURLIN: Right.

[23] THE COURT: So how can we use –

MR. HEURLIN: Pardon?

THE COURT: How can we use the $940,000 figure as a benchmark?

MR. HEURLIN: Well, what I am suggesting here is to – I am trying to come up with a reasonable benchmark. And, in doing so, I am taking essentially three years before and three years after to find out what the average earnings are. And this is essentially something that obviously is something that you are going to have to decide on.

And this was a thriving practice before he entered into his relationship with Vivra and had great potential. And the balance here has to be a measure

of that value because, as Dr. Grossman said, he was three years into a deal with seven years left that got cancelled and had a lot of potential.

And I am not saying that this is the only way to calculate this. The only thing I could do is say – present all this to you and with the description as to what he was doing before he entered in this relationship with Vivra and what he has done since he has been allowed to practice after he terminated – he was terminated by Vivra, and the difference between before when he had the clinical research and now when he doesn't. And I think that's really a measure of the damages.

And these things are going to change all the time, you know, with inflation and interest and all sorts of things. And the practice and the value of new drugs, these things are going to fluctuate. And, basically, if anything, his income would increase over a period of years. In 1994, his income, as stated here, in 2004, had he been doing the same thing, he would have made multiples, I would say, of the 1994 dollars.

But the bottom line, to answer your question, this is my proposal. Its certainly not the only way to try to calculate this. And the only thing I could do is state one of innumerable ways to calculate damages and to explain how we have done that.

And, when we talk about this, as I say further on in my Statement of Damages, that we have mitigation here, because Dr. Grossman did, instead of having zero damages and complying with the noncompete clause,

he violated the noncompete clause and went to a hearing. He prevailed. And so he is practicing today – or at least he practiced for two years after being terminated to mitigate his damages. And so instead of having zero in 2000 and 2001 and part of 2002, he had those figures. So, as far as his damages and lost wages, lost salary, [25] we state those here.

And another important part is that his lost damages go on forever. For as long as he practices, he is not doing any clinical research. That has hit him by his reputation in the community of allergy clinical researchers and economically henceforth. And this is a case where once you are – he works hard to build up his reputation. And, once his reputation is damaged, it's irreparable.

And we state that in the part about the damage to the professional and personal reputation, that – and once again, this is not the only calculation we can make. But, as far as his reputation is concerned, and this is not an economic, lost income issue; this is an issue regarding his personal reputation, essentially the tort part of it as opposed to the loss-of-.income part.

And we have proposed the damages multiplied by three for the figure of 1,035,000.

THE COURT: How old is Dr. Grossman?

MR. HEURLIN: 61.

DR. GROSSMAN: 61.

THE COURT: How long does Dr. Grossman plan to practice?

DR. GROSSMAN: As long as I am healthy, your Honor. Hopefully until age 70 was my goal.

[26] MR. HEURLIN: Now, the next thing I want to discuss in my Statement of Damages is the abuse of process. And I will tell you, I have been practicing for 32 years, and I have never seen anything like this. Davidson sued Dr. Grossman in U.S. District Court, filed a 300-page complaint. We went around – that was dismissed. I moved to dismiss that. It was dismissed.

Davidson filed a TRO, and that was, dismissed. And then he filed an appeal in the Ninth Circuit. He went to the Supreme Court without a decision yet in the Ninth Circuit. He has this case, which has been going on for many years, and he filed an appeal that was untimely, this frivolous appeal. He went to the Court of Appeals. He wanted to bypass the Court of Appeals, go to the Arizona Supreme Court. The Arizona Supreme Court sent it back to the lower courts. He appealed it to the Arizona Supreme Court They denied review.

I got a judgment for costs and attorney fees, which is a combination that you entered that was a combination of cost and attorneys fees, and both the Arizona Court of Appeals and the Arizona Supreme Court. I recorded that as a judgment, threatened to execute on it and Dr. Davidson's home. He ended up paying the judgment, and then he sold his home.

He lives in Texas. As far as I know, he has [27] no assets in Arizona.

He filed an emergency stay with Justice O'Connor. I think he has a petition for certiorari pending, even though the Ninth Circuit hasn't ruled.

He filed this. As you know, you entered an Order, and then he files a three-inch document asking to you reconsider your Order. We have a petition for a special action pending.

Dr. Davidson has just flaunted and abused our system in both U.S. District Court and the Superior Court, and the Court of Appeals, and the Supreme Court of Arizona and the Supreme Court. And he should be expected to continue to do that.

And you have awarded sanctions in our attorneys fees in this case. The attorneys fees were not separated between what has to do with the Complaint and what has to do with the Counterclaim. There was one bill that had to do with everything. And what we propose to do is take 20 percent of the total bill as sanctions. And then as punitive damages, we propose – we request $5,500,000.

Now, two things I would like to say in conclusion to this. One is that this is a lot of money. But, as you could see, there was a lot of money at stake. Dr. Grossman, if he had never had anything to do [28] with Vivra, if he had never had anything to do with Dr. Davidson, likely would have made a lot more money and along the lines of a million dollars a year

as he was doing before he got into this relationship. In 1996 he made $1.2 million without Vivra, without Dr. Davidson.

And, if he had got into Vivra and had expanded throughout the Southwest, he may have made more money. Obviously, when he makes $1.2 million and then goes into Vivra, he is entering this contract with Vivra with the idea of making more money and having a more expansive practice, both in terms of patients and in clinical research. That's what his goal was in doing this, and that's what the agreement was.

Well, this has become a disaster. Not as bad as it could be. He has built up his practice in Tucson and has a nice income today. But his nice income today is half of – less than half of what he was making before in Tucson. And he has valued his reputation. That reputation has been damaged to the extent that he cannot do what he has a lot of expertise in and is known to do, and that is clinical research. And all of these companies aren't dealing with Dr. Grossman because of what happened here.

The second thing I would like to say, and the [29] final thing, is that I would like to get a judgment against Dr. Davidson for two reasons. One is that he severely injured Dr. Grossman economically. And, secondly, he severely injured him by his reputation. I doubt that Dr. Davidson is going to have the money to pay a judgment. I don't know what he has, what he doesn't have.

Not being a bankruptcy lawyer, I don't know whether all of this or some of it is nondischargeable. Without having any experience on it, I would merely speculate that maybe the sanctions and punitive damages are nondischargeable in bankruptcy.

So I would like to conclude that and ask you to enter a judgment, or enter a minute entry ordering me to prepare a form of judgment to submit to you fairly promptly and enter a final judgment in this case, Thank you.

THE COURT: Thank you.

I have got some questions. You have asked for sanctions of $11,660. Is that 20 percent of your attorneys fees in this case? That seems awfully low.

MR. HEURLIN: I think it is. It's in one of those bills that you have – I don't have my bills. One of those exhibits, Exhibit 5.

THE COURT: It says 54,982.

[30] MR. HEURLIN: And so probably 20 percent of that figure is this 11,660.

THE COURT: You are saying that $11,000 figure is the proposed sanction against defendants for filing the counterclaim? Because, if I award you all of the attorney fees that are in this bill, I have already awarded you the fees for defending the counterclaim, correct?

MR. HEURLIN: Correct.

THE COURT: So this is just an additional proposed sanction for filing the counterclaim?

MR. HEURLIN: Right.

THE COURT: How does that differ from an abuse of process damages?

MR. HEURLIN: Well, I am glad you ask that. The abuse of process damages, I think, is something that – first of all, the abuse of process is also intentional infliction of emotional harm, distress, which is an intentional tort versus a negligent tort and may not be dischargeable either. But that is to his reputation, and we don't have any documents other than what we have already presented to you that would prove how he has done that.

In other words, his abuse of process and intentional infliction of emotional distress, the [31] damages for that, I believe, are the same damages as the other damages. In other words, his abuse of process – not all the other damages. But his abuse of damages that really starts in this case – well, it has to be limited to this case. I don't think you could award abuse of damages in the federal case. So it has to do with this case, and when he started here, and all these appeals and stuff.

The abuse of process and the intentional infliction of emotional harm, I think goes to the other damages that we have stated there that – in other words, the stuff that I have already presented to you is Dr. Grossman's loss regarding his other counts, but

it's also the same proof as to his loss regarding the abuse of process, intentional infliction of emotional distress.

So what I am saying, essentially, is that I would like, if we could talk criminal law kind of terms, to have the damages run concurrently, that the damages for – based upon these other counts should be the same as on the abuse of process, intentional emotional distress count, but the counts run concurrently so the same damages apply to both counts.

THE COURT: How can Dr. Grossman's lost wages be attributed to the abuse of process and intentional [32] infliction of emotional distress? And particularly the abuse of process, because the lost wages had at least started and were set really by the time this lawsuit was filed.

MR. HEURLIN: Well, I would agree that they would not. I agree with what you said. However, I think that the intentional infliction of emotional distress part is something that does encompass all of that. What Davidson did in 1999 in his lies were intentional and they were intended to inflict emotional distress. And that – his action in 1999 is the proximate cause and has been deemed admitted as to all these damages. It certainly resulted in lost wages. It resulted in the Vivra thing collapsing, and it resulted in the damage to his reputation.

THE COURT: All right. Is it possible for you to prepare a form of judgment and get it to me by tomorrow –

MR. HEURLIN: Yes.

THE COURT: – with just blanks in it?

MR. HEURLIN: Yes.

THE COURT: "Blanks" meaning where you put the numbers in.

MR. HEURLIN: Right.

THE COURT: Those would be the only – and [33] there should be a signature blank; that would be good, too. And, if I decide that the evidence doesn't support an award of any specific kind of damages, I will just draw a line through that entry.

MR. HEURLIN: All right.

THE COURT: And, obviously, you need a spot for the claimed attorney's fees and costs. And the amount you are asking for in attorney's fees and costs I presume is the combined total of these two bills (indicating)?

MR. HEURLIN: Yes.

THE COURT: All right. Thank you. Is there anything further we need to cover today?

MR. HEURLIN: No. Thank you, your Honor.

THE COURT: If you will get that to me tomorrow, I will get it done.

* * *

[34] CERTIFICATE

I, Gail D. Vinson, do hereby certify that as a Certified Court Reporter for the Pima County Superior Court, I reported the foregoing proceedings to the best of my skill and ability, and that the same was transcribed by me via computer-aided transcription, and that the foregoing pages of typewritten matter are a true, correct and complete transcript of all the proceedings had, as set forth in the title page hereto.

/s/ Gail D. Vinson
GAIL D. VINSON, RPR, CSR
Arizona License No. 50610
Pima County Superior Court
Tucson, Arizona

4/4/05

(Filed
In the Office of the
Secretary of State of Texas
SEP 13, 1999 Corporations Section)

TEXAS ARTICLES OF ASSOCIATION OF A PROFESSIONAL ASSOCIATION

The undersigned being of the age 18 of [sic] older, files these articles of association pursuant to article 1528f of the Texas Professional Association Act

1 The name of the corporation DOMINION HEALTH SERVICES, P A

2 The address of the association is 14721 Whitecap #395, Corpus Christi, TX 78418

3 The corporation is a professional association

4 The period of duration is 12/31/49

5 The purpose of this corporation is Internal medicine services

6 The association will not commence business until it has received for the issuance of its shares consideration of the value of a stated sum which shall be at least one thousand dollars ($1,000), consisting of money labor done, or property actually received

7 The street address of the registered office is 905 Congress Avenue, Austin, TX 78701
The name of the registered agent located at such addre [sic] Business Filings Incorporated

8 The name and address of the initial member is Robert Davidson 14721 Whitecap #395, Corpus Christi, Texas 78418

9 The initial member is licensed to perform internal medicine services

10 The name and address of the initial director is Robert Davidson, 14721 Whitecap #395, Corpus Christi, TX 78418

11 No member of the professional association shall have the power to dissolve the association by their independent act of any kind

August 25, 1999

/s/ Robert Davidson
Robert Davidson Member License # H2328

(Filed
In the Office of the
Secretary of State of Texas
NOV 17, 1999 Corporations Section)

TEXAS ARTICLES OF ORGANIZATION OF A LIMITED LIABILITY COMPANY

The undersigned, being of the age 18 or older, files these articles of incorporation pursuant to article 11.01 of the Texas Limited Liability Company Act

1. The name of the limited liability company: HEALTH PATRONS PLLC

2. The period of duration: 12/31/2039

3. The professional service to be rendered by the professional limited liability company is: Provision of home health services (and ancillary services, e.g. infusion therapy, respiratory therapy, compounding pharmacy, durable medical equipment) to home-bound and/or institutionalized patients under the supervision of a licensed physician.

4. The name of the registered agent located as such address is: Business Filings, Inc., 905 Congress Ave., Austin, TX 78701 Located in the County of Travis

5. The limited liability company will have managers and the names and addresses of its initial mangers are:
Robert Davidson, M.D., P.O. Box 60014, Corpus Christi, Texas 78466-0014

6. The name and address of the organizer:
Richard A. Oster, 8025 Excelsior Dr., Suite 200,
Madison, WI 53717

/s/ Richard Oster
Richard A. Oster

(Filed in TXSD on 09/18/2007)

NOTICE OF CONSTABLE SALE
(PERSONAL PROPERTY)

BY VIRTUE OF A Order Granting Application for Turover [sic] of Mon-Exempt [sic] Personal Property in Aid of Execution issued out of the 188 District Court of Gregg County, State of Texas, in a certain cause numbered: 2005-93-A on a judgment rendered in said Court on the 10 day of May A.D. 2007, and directed and delivered to me, as Constable of Gregg County, Texas, I have on the 15 day of May, 2007 levied upon and will offer for sale on the 25 day of June A.D. 2007 between the hours 10:00 A.M. and 4:00 PM (at approximately 10:00 A.M..), at public auction to the highest bidder, for cash in hand, at Gregg County Court House at 101 East Methvin St. in Longview, Gregg County, Texas, all the right, title and interest, if any, of and to the following personal property, to wit:

1. Dominion Health Services, P.A., a Texas Professional Association

2. Health Patrons, PLLC, a Texas Professional Limited Liability Company

The above property is levied on as the property of Robert Michael Davidson and Vanessa Davidson and will be sold to satisfy a Judgment in the Superior Court of the State of Arizona Court of Pima County rendered on the 23 day of March A.D. 2005 in favor of Jay Grossman and Eudice Grossman and against the

said Robert Michael Davidson and Vanessa Davidson a.k.a. Vanessa E. Komar,

FOR THE PRINCIPAL, INTEREST AND ALL COSTS ACCRUING BY VIRTURE [sic] OF SAID SUIT THE TOTAL SUM OF $9,534,032.96 DOLLARS.

GIVEN UNDER MY HAND on this 5 day of June A.D. 2007.

Constable Bill Echart
Precinct 3
Gregg County, Texas

By /s/ Bill Echart

(Filed in TXSD on 04/21/2008)

NOTICE OF CONSTABLE SALE
(PERSONAL PROPERTY)

BY VIRTUE OF A Turnover Order issued out of the 188th District Court of Gregg County, State of Texas, in a certain cause numbered: 2005-93-A on a judgment rendered in said Court on the 16 day of June A.D. 2006, and directed and delivered to me, as Constable of Gregg County, Texas, I have on the 28 day of July, 2006 levied upon and will offer for sale on the 4 day of August A.D. 2006 between the hours 10:00 A.M. and 4:00 PM (at approximately 1:00 P.M..), at public auction to the highest bidder, for cash in hand, at 101 East Methvin Street in Longview, Gregg County, Texas, all the right, title and interest, if any, of and to the following personal property, to wit:

(a) Serenitas International, LLC

(b) Tranquiliy [sic] Ventures, LLC

(c) Sunshine Trading Company, Ltd.

The above property is levied on as the property of Robert Michael Davidson and Vanessa Komar Davidson and will be sold to satisfy a Writ of Execution in the 188th District Court of Gregg County rendered on the 22 day of March A.D. 2006 in favor of Jay Grossman and Eudice Grossman and against the said Robert Michael Davidson and Vanessa Komar Davidson,

FOR THE PRINCIPAL, INTEREST AND ALL COSTS ACCRUING BY VIRTURE [sic] OF SAID SUIT THE TOTAL SUM OF $9,018,951.40 DOLLARS.

GIVEN UNDER MY HAND on this 24 day of July A.D. 2006.

Constable Bill Echart

/s/ Bill Echart
Gregg County, Texas

Fifth Circuit Rule 47.6 from Fifth Circuit Rules and Internal Operating Procedures (IOP) (As amended through August 2008), states,

> ***47.6 Affirmance Without Opinion.*** *The judgment or order may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears. In such case, the court may, in its discretion, enter either of the following orders: "AFFIRMED. See 5th CIR. R. 47.6." or "ENFORCED. See 5th CIR. R. 47.6."*